No. 55.

Brief of Defendant in Error.

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JAMES H. MCKENNEY
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UNITED STATES OF AMERICA.

Supreme Court of the United States.

Filed January 10, 1898.

OCTOBER TERM, 1897.

No. 55.

A. BACKUS, JR., & SONS, and ABSALOM BACKUS, Jr.,
Plaintiffs in Error,
vs.
THE FORT STREET UNION DEPOT COMPANY,
Defendant in Error.

Error to Supreme Court of Michigan.

Brief for Defendant in Error.

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STATEMENT OF THE CASE.

The provisions of the Michigan Union Depot Act of 1881 for the condemnation of private property to the public use, were copied from the Michigan general railroad law, first passed in 1855.

1 How. Stat. of Mich., p. 890, Secs. 3463-3471.
1 How. Stat. of Mich., p. 845, Secs. 3331-3340.

They were an adoption from the general railroad law

of 1850 of the State of New York, and are almost word for word the same.

General Stat. of N. Y., 1829-1851, Blatchford's Ed., p. 873.

The procedure prescribed by the act may be summarized as follows:

1. The filing of a petition in a court of record, and the service of the same, with notice of the time and place of the hearing thereon, on the owners and others interested in the property to be taken.

2. The appointment of three commissioners or at the option of the respondents, the selection of a jury of twelve disinterested freeholders residing in the vicinity of the property, to act as the trial court or tribunal.

In case a jury is demanded and is empanelled the judge of the court, or a circuit court commissioner to be designated by him, may attend the jury, to decide questions of law and administer oaths to witnesses. If no judge or commissioner attends, the jury conduct their own proceedings.

3. The trial or hearing of the case before the commissioners or the jury on sworn testimony, an inspection of the property, and arguments of counsel, substantially the same as in common law actions.

4. The determination of the case by the commissioners or jury, and the filing of their report or verdict with the court, showing their decision upon the questions (1) Whether it is necessary to take the private property described in the petition for the public use or benefit, and (2) The amount of the just compensation to be awarded and paid to the owner and other interested parties.

5. The confirmation of the report or verdict by the court, and the entry of an order directing to whom the

money is to be paid or when and where it is to be deposited by the company.

A certified copy of the order is to be recorded in the office of the register of deeds of the county.

"And thereupon, on the payment or deposit by the said company of the sum to be paid as compensation for such land, franchise, or other property, and for costs, expenses and counsel fees as aforesaid, and as directed by said order, *the company shall be entitled to enter upon and take possession of and use the said land, franchise and other property for the purpose of its incorporation; and all persons who have been made parties to the proceedings, either by publication or otherwise, shall be divested and barred of all right, estate and interest in such real estate, franchise or other property, until such right or title shall be again legally vested in such owner;* and all real estate or property whatsoever acquired by any company under and in pursuance of this act, for the purpose of its incorporation, shall be deemed to be acquired for public use: Provided, the said sum to be paid as damages and compensation, and costs, expenses and counsel fees as aforesaid, shall be paid by the company, or deposited as provided in this act, within sixty days after the confirmation of said report by the said court; and in case said company fail or neglect so to do, such failure or neglect shall be deemed as a waiver and abandonment of the proceedings to acquire any rights in said land or property."

It was held in New York in 1853, two years before the statute was adopted in Michigan, that the effect of recording the order of confirmation and the payment of the money, was to transfer the title to the property or right of way taken, to the company.

The Court said:

"In the words and by the necessary operation of the 18th section, on the recording of the order above mentioned and the deposit of the money, both which acts were performed by the company upon the original appraisal, the company were not only entitled to enter upon and use the land appropriated and appraised, but all the

parties to the proceeding were divested and debarred of all right, estate and interest in such real estate during the existence of the company. This is in substance and effect a statutory conveyance of the land, wholly divesting the owner of his title, and vesting it in the company. And this necessary effect of the proceeding is recognized by a further provision in this same section, that if on the second appraisal the compensation is increased, the difference shall be a lien upon the land appraised, thus treating it as it truly is, as the land of the company. A lien on one's own land would be a legal absurdity."

Crowner vs. Watertown, etc., R R., 9 How. Pr., 457.

6. The award so made and paid is subject, however, to such modification as may be the final result of an appeal by either party to the Supreme Court of the State.

The provisions providing for appeals are as follows:

"Within twenty days after the confirmation of the report of the commissioners or jury, as above provided for, either party may appeal, by notice in writing to the other, to the Supreme Court, from the appraisal or report of the commissioners or jury; such notice shall specify the objections to the proceedings had in the premises, and the Supreme Court shall pass on such objections only, and all other objections, if any, shall be deemed to have been waived; such appeal shall be heard by the Supreme Court at any general or special term thereof, on notice thereof being given according to the rules and practice of the court. On the hearing of such appeal, the court may direct a new appraisal before the same or new commissioners or jury, in its discretion. The second report shall be final and conclusive upon all parties interested. *If the amount of the compensation to be allowed is increased by the second report, the difference shall be a lien on the land appraised, and shall be paid by the company to the parties entitled to the same, or shall be deposited as the court shall direct; and in such case, all costs of the appeal shall be paid by the company; but if the amount is diminished, the difference shall be refunded to the company by the party to whom the same may have been paid, and judgments therefor and for all costs of the appeal shall be rendered against the party so ap-*

pealing. On the filing of the report, such appeal, when made by any claimant of damages, shall not affect the said report as to the right and interest of any party, except the party appealing; nor shall it affect any part of said report in any case, except the part appealed from; nor shall it affect the possession of such company of the land appraised; and when the same is made by others than the company, it shall not be heard except on a stipulation of the party appealing not to disturb such possession during the pendency of such proceedings."

It is also settled in New York that the statute permits the company to pay the award and take possession, without losing its right to appeal and secure a new appraisal; and that the property owner has the same right, that is, that he can accept the award, without losing his right to appeal and secure a new appraisal.

In re N. Y., etc., R. R., 94 N. Y., 287.
In re N. Y., etc., R. R., 98 N. Y., 12.

THE PROCEEDINGS IN THIS CASE.

In the case at bar, the owner, Absalom Backus, Jr., and his tenant, A. Backus, Jr., & Sons, a corporation, were duly notified and given full hearings before three different juries, before the Circuit Court for the County of Wayne on motions to confirm, and before the Supreme Court of the State on an appeal by the company, and again on a certiorari sued out by themselves.

1. The first jury disagreed.

Record, pp. 9-10.

2. The second jury awarded the respondents in the aggregate, $96,143.

Record, pp. 847-848.

3. The company paid the awards and took possession under the statute.

Record, pp. 1151-1152.

4. The Supreme Court of the State on an appeal by the company set the awards aside and granted a new trial, before a new jury.

Record, pp. 948-969.

5. The third jury awarded the respondents in the aggregate $63,000, being a reduction of $33,143.*

Record, p. 980.

6. The first awards having been paid to the respondents the trial court entered up judgments against them for the amount of the reduction and costs, according to the statute.

Record, pp. 1791-1792.

7. The judgments against the respondents were reviewed by the Supreme Court of the State on a common law certiorari; and they were duly affirmed.

Record, pp. 1816-1822.

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*The statement in the certificate of the Clerk of the Wayne Circuit that the verdict of the jury could not be found in the files of the court is not true. It was found in his office, and a certified copy was produced on the hearing in the State Supreme Court.

THE QUESTIONS IN THIS CASE.

The only questions in the case are whether the respondents below, and plaintiffs in error here, have been deprived of their property without due process of law, or been denied the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

In determining the federal questions, if any, presented by this record, it will be necessary to ascertain in the first place what the law of Michigan is and then to determine whether that law, as applied to and enforced in the case at bar, is in conflict with the provisions of the Fourteenth Amendment of the Constitution of the United States.

In the first three subdivisions of this brief I will discuss the questions in this case as state questions. In the next three subdivisions of this brief I will discuss the same questions as federal questions.

AS STATE QUESTIONS.

I.

The provisions of the Michigan Union Depot Act providing that in condemnation proceedings the company may pay, and the property-owner may receive, the amount of the first appraisal, and that the title to, and possession of, the property condemned, shall thereupon pass to the company, but subject to the right of the property-owner to obtain an increase, or of the company to obtain a reduction of the appraisal, as the final result of an appeal by either party to the State Supreme Court, are not in conflict with the constitution of that state.

The Constitution of Michigan contains the following general provision regulating the exercise of the power of eminent domain:

"When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of twelve free-holders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law."

Art. XVIII., Sec. 2.

Another provision which has no application to railroad condemnations reads:

"Private property shall not be taken for public improvements in cities and villages without the consent of the owner unless the compensation therefor shall first be determined by a jury of free-holders and actually paid or secured in the manner provided by law."

Art. XV., Sec. 15.

Another provision which does apply to railroad condemnations is as follows:

"The property of no person shall be taken by any corporation for public use without compensation being first made or secured in such manner as may be prescribed by law."

Art. XV., Sec. 9.

The very learned and distinguished counsel for the plaintiffs in error, in his brief on the motion to dismiss, pp. 20-21, contends that the New York cases are not authority in Michigan, cause the New York Constitution of 1846, under wh their general railroad law of 1850 was passed, is not ae the Constitution of Michigan. The learned counsel is in error in referring to the provision of the Michigan Constitution relative to public improvements in cities and villages that the compensation "shall first be determined by a jury of freeholders and actually paid or secured in the manner provided by law;" but the legal effect of that provision as far as the time when the compensation is to be made or secured is concerned, is identical with the provision, relating to condemnations by private corporations, that the compensation must be "first made or secured in such manner as may be prescribed by law."

There are at least five separate and distinct answers to the position of the learned counsel:

FIRST ANSWER.

Where the property is taken by a private corporation, there is no difference as to the time when the compensation is to be paid or secured between the Constitution of 1846 of the State of New York, and the Constitution of 1850 of the State of Michigan. Under either instrument the compensation must be "*first*" paid or secured.

Nor is there any difference in the requirements as to commissioners or a jury. The only difference is that under the Michigan Constitution the commissioners or jury determine the question of public necessity as well as the question of compensation or damages. The New York Constitution of 1846 contains these provisions:

"Nor shall private property be taken for the public use without just compensation."

Art I., Sec. 6.

"When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record as shall be prescribed by law."

Art I., Sec. 7.

The provision that private property shall not be taken for public use without compensation is also in the New York Constitution of 1821.

Art. VII., Sec. 7.

There is no express requirement in these provisions that the compensation shall be *first* paid or secured, but it was settled in New York long before 1850, that a private corporation could not take private property for the public use unless it *first* paid or secured the property owner.

In Bloodgood vs. Mohawk & Hudson R. R. Co., 18 Wend., 9, decided in 1837, the act incorporating the company provided for the appointment of three commissioners by the Governor of the State "to determine the damages which the owner or owners of the land or real estate so entered upon by the corporation has or have sustained by the occupation of the same; and upon payment of such damages" (with the costs of the appraisement, or upon

depositing the amount of such damages in a bank in the City of Albany to the credit of such owner or owners, notice thereof being given) "then the said corporation shall be deemed to be seized and possessed of the fee simple of all such land or real estate," etc.

In an action of trespass quare clausum fregit, brought by the owner of land, against the company, the latter justified under condemnation proceedings, but did not allege that it had paid or deposited the damages awarded as provided for in the act of incorporation.

Held, that the plea of justification was insufficient and the demurrer thereto was sustained.

Chancellor Walworth in his opinion, pp. 17-18, said:

"But it certainly was not the intention of the framers of the Constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the Legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided and upon an adequate fund, whereby he may obtain such compensation through the medium of the courts of justice, if those whose duty it is to make such compensation refuse to do so. In the ordinary case of lands taken for the making of public highways, or for the use of the State canal, such a remedy is provided; and if the town, county, or State officers refuse to do their duty in ascertaining, raising, or paying such compensation in the mode prescribed by law, the owner of the property has a remedy by mandamus to compel them to perform their duty. The public purse, or the property of the town or county upon which the assessment is to be made, may justly be considered an adequate fund. He has no such remedy, however, against the Legislature to compel the passage of the necessary laws to ascertain the amount of compensation he is to receive, or the fund out of which he is to be paid. In the case under consideration, if this company were authorized to take possession of the plaintiff's property and complete the construction of their road, before his damages were assessed and paid, or offered to be paid to him, he might

have been wholly without redress, as he had no power to compel the assessment of damages, and no adequate fund was provided for the payment of damages when ascertained. The citizen whose property is thus taken from him without his consent, is not bound to trust to the solvency of an individual, or even of an incorporated company, for corporations as well as individuals are sometimes unable to pay all their just debts; especially those corporations which are authorized to incur heavy responsibilities in anticipation of the payment of their capital by the subscribers for the stock; and if the true construction of this charter was such as is contended for by the defendants' counsel, I should hold that the provision which authorized the appropriation of the plaintiff's property to the use of the corporation before the damages had been ascertained and paid, was unconstitutional and void."

Senator Edwards, at pp. 27-29, said:

"I am aware that under the statutes authorizing the construction of canals, the commissioners are authorized to take private property; and that the damages are afterwards to be appraised and paid for by the State; and that the right of the commissioners to enter upon and take the property of individuals before the State compensates the owner, has been sanctioned by the judicial decisions of this State. See Rogers & Magee vs. Bradshaw, 20 Johns. R., 744; Jerome vs. Ross, 7 Johns. Ch. R., 343; Wheelock vs. Pratt, 4 Wendell, 650. And although I am decidedly of the opinion that the construction given to the Constitution under these decisions, is a forced construction, and one which was pressed upon the Court, from the extreme necessity of the case, I do not feel disposed to controvert them, nor is it necessary to do so, for the purpose of coming to the conclusion I have arrived at, in the case under review. The strong reason why a strict and rigid compliance with the terms of the Constitution has not been required, where private property has been taken for the construction of canals, is, from the undoubted responsibility of the State to compensate the owner. When legal provisions have been made for payment by the State, it has been deemed ready pay or an equivalent. But this reason cannot exist in its full force when applied to in-

«corporated companies. They are often irresponsible, and no such general rule can be established as applicable to them, without greatly hazarding the property of the individual. I am decidedly of the opinion, therefore, that no such construction can with propriety be given to the Constitution, when applied to them; and if the act admits of such a construction, and such only, then it is unconstitutional and void, and could furnish no protection to the defendants, even had they set out the proviso, unless they had averred that they had satisfied the damages, or that they were ready and willing to make satisfaction."

Senator Maison, at p. 36, referring to the opening of township highways before payment of compensation, said:

"Here, the faith and solvency of the town are pledged to the owner, that he shall certainly be paid for his property taken for the road. In such case the property is allowed to be taken and used before payment, and for the reason that the payment will certainly be made without hazard or doubt. Cadwallader's Heirs vs. McIlvoy, 1 A. K. Marsh R., 84; Jackson vs. Winns' Heirs, 4 Litt. R., 323."

Referring to an act for the opening of streets in New York City he said:

"The faith and solvency of the city are here pledged for payment."

Passing to a consideration of the proper construction of the act of incorporation, before the Court, Senator Maison, at p. 40, said:

"I have no doubt of the perfect solvency of this corporation, and their unquestioned ability to make compensation, either before they commenced or after they had completed their road; but we are looking for a principle which shall be of general application, irrespective of the solvency of any particular corporation—a principle which shall shield and protect the citizen from all hazard of loss, securing to him absolute certainty of compensation for his property taken for public use. To render the law constitutional, then, we must intend that the Legislature, in the provisions they have made, have declared

that compensation shall be made *before* the property can be taken. This is no forced construction of the act."

Senator Tracy, at p. 74, said:

"Assuming that land taken for the construction of a railroad is taken for public use, as much as when taken for a canal owned by the State, or for a public road laid out by the town officers under the highway act, or for a turnpike road, it is in vain to seek an analogy in respect to the certainty of the compensation secured in the one case and in the others. In regard to lands taken for State canals or for common highways, the fund from which compensation is secured is a public one and certain, and the means for ascertaining the damages and for reaching the fund, are defined, specific, and at the command of the party injured; and in regard to lands appropriated to a turnpike road, the statute requires not only that the damages shall be assessed, but actually paid or tendered before the lands can be entered upon by the corporation."

He concluded his opinion at p. 77, as follows:

"I conclude, therefore, that in the present case where there was no public fund, which in law and in fact must be deemed always adequate to insure the payment of such damages as shall be found to have accrued, that the Legislature could not authorize the defendants to enter upon and possess and use the lands belonging to the plaintiff, until they had *first* paid, or offered to pay to him, a just compensation therefor; and that the plea in this case, containing no averment that compensation had been made or offered, is bad, and therefore the judgment of the Supreme Court which sustains the sufficiency of the plea, should be reversed."

SECOND ANSWER.

The Michigan general railroad and union depot acts both plainly and unequivocally provide that the amount awarded by the first jury (that is, by the first jury finding in favor of the public necessity, and agreeing upon the amount of compensation to be paid for the property

taken), must be paid to the property owner, or be deposited as the Court may direct, before the company "shall be entitled to enter upon and take possession of and use the said land, franchise and other property, for the purpose of its incorporation."

1 How. Stat., Secs. 3468, 3337.

This statute does not permit the company to take possession, nor does it pass the title to the property, upon the filing of any sort of bond or other security; its peremptory requirements are, that the money must be actually paid to the property owner or be actually deposited so as to be within his reach. One of the objects of the provision authorizing a deposit of the money is to meet any exigency that might arise if the property owner should refuse to accept a tender of the money, or if there is some undetermined dispute between the owners and others interested as to who is entitled to receive the money, or if it is necessary to secure the appointment of a general guardian for any infant, or other incompetent person who is entitled to the award. The special guardian authorized to be appointed in these proceedings is only given power to "appear for and attend to the interests of such infant, idiot or person of unsound mind," and to that end it is provided that "all notices to be served in the progress of the proceeding may be served on such special guardian."

1 How. Stat., Sec. 3332, subd. 4.
Id., Sec. 3364, subd. 4.

Whatever may be the object of the provision authorizing a deposit of the money, this much is certain, that when the money is deposited as directed by the order of the Court, it is subject to the direction of the Court, and is to be paid over to the property owner or other inter-

ested party, whenever he is entitled to receive it. This is made clear by the following provision:

"If there are doubts about the title, or to whom the money, or any part of it, to be paid as compensation for the real estate or property taken, belongs, the Court may direct the money to be paid into said court by the company, and may determine who is entitled to the same, and direct to whom the same shall be paid, and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made."

1 How. Stat., Secs. 3338, 3469.

THIRD ANSWER.

There can be no valid constitutional objection to legislation which provides that the confirmation of an award in a condemnation suit shall be regarded as a final judgment, and that the award may be paid and received, and be fully acted upon by the parties, with the legal result and effect, that the title and possession of the property condemned is thereby transferred; but subject to the right of either party, or of both, to obtain a review of the award on allegations by the property owner that the amount is not adequate, or on allegations by the condemning corporation that it is excessive.

Legislation permitting such review can have no other object or purpose than that of furnishing an appropriate writ or remedy for the correction of any injustice that may be found to exist in the first or original award.

The statutes of Michigan relative to the action of ejectment provide that a judgment in ejectment shall be conclusive as between the parties, but that the defeated party can have a new trial at any time within three years upon payment of all costs and damages recovered thereby; and if the plaintiff has taken possession, and the defendant

recovers on the new trial, a writ of possession issues to restore the possession to the defendant.

2 How. Stat., Secs. 7821, 7822, 7827.

The first result reached in any litigation or in condemnation proceedings does not establish any such vested right and is not of any such conclusive and final nature as to preclude a subsequent review thereof for the correction of either errors of law or of fact, and the legislation in Michigan which provides for such review cannot possibly be held a violation of the Constitution of the State or of any constitutional guaranty known to American law.

We have already shown that the Michigan statute was adopted from the New York general railroad law of 1850.

A similar system was adopted in Massachusetts as early as 1833.

Mass. Rev. Stat., 1836, pp. 343-345.

The Massachusetts statutes provide for an original assessment of damages by the county commissioners, with a right in either party if dissatisfied, to apply for a jury.

Id., p. 344. Secs. 56. 57.

Other provisions are as follows:

"Sec. 61. In case of such application being made to the commissioners, either by any such owner or by any railroad corporation, for an estimate of damages, the commissioners shall, if requested by said owner, require the said railroad corporation to give security to the satisfaction of said commissioners, for the payment of all such damages and costs, as shall be awarded by the said commissioners or by a jury, for the land or other property so taken; and all the right or authority of said corporation to enter upon or use said land or other property, except for making surveys, shall be suspended until they shall give such security.

"Sec. 62. After the commissioners shall have made their estimate as aforesaid, the said railroad corporation may tender, to the owner of the land or other property, the amount of damages so estimated, in full satisfaction thereof; and if the said owner shall refuse to receive the same, with costs to be taxed to that period, and shall apply for a jury as aforesaid, he shall pay all costs caused by such application, arising after such tender, unless upon the final hearing he shall recover a greater amount of damages than the sum tendered; and if the said corporation shall apply for a jury, and upon a final hearing, the damages, as estimated by said commissioners, shall not be reduced, the said corporation shall pay all costs caused by such application."

Id., pp. 344, 345.

Section 62 was construed in the following cases:

Com. vs. Boston & Maine R. R., 3 Cush., 55.
Gray vs. Lowell & Lawrence R. R., 4 Cush., 609.
Harvard Branch R. R. vs. Rand, 8 Cush., 218.

It was held:

1. That where the railroad corporation obtained an assessment by a jury reducing the estimate of the commissioners it was not liable for costs to the property owner, but could not recover costs from him, because the statute did not provide for it.

2. That where the property owner applies for a jury, and the jury does not increase the award, or reduces it, he is not liable for costs, unless the railroad corporation had tendered to him the amount awarded by the commissioners and he had refused to accept it.

As pointed out by Mr. Justice Gray in the subsequent case of New Haven & Northampton Co. vs. Northampton, 102 Mass., 120, the Court in the prior cases overlooked the act of 1841, c. 125, sec. 3, which contained a new provision relative to the costs to be awarded on an assessment of damages by a jury in railroad cases:

"And upon any application for a jury to assess such damages, the *prevailing* party shall be entitled to his legal costs to be recovered in the same manner as in case of applications for juries to assess damages occasioned by laying out highways as provided in the twenty-fourth chapter of the Revised Statutes."

1 Laws of Mass., 1839 to 1842, n. s. pp. 403-4.

The general statutes of Massachusetts of 1860, following the act of 1841, provide:

"Either party, if dissatisfied with the estimate made by the commissioners, may at any time within one year after it is completed and returned, apply to a jury to assess the damages. Upon such application the prevailing party shall recover legal costs and the proceedings thereon shall be the same as is provided for the recovery of damages in the laying out of highways."

Gen. Stat. Mass., 1860, p. 352, Sec. 22.

Section 62 of the Rev. Stat. of 1836, above quoted, was retained in the revision of 1860.

Gen. Stat. Mass., 1860, p. 354, Sec. 35.

In the case above mentioned of New Haven & Northampton Co. vs. Northampton, 102 Mass., 116, the Court had occasion in an opinion by Gray, J., to review all this legislation and the prior decisions, in a case where the railroad corporation being dissatisfied with the estimate of the commissioners, did not make a tender, but applied for a jury and obtained a verdict reducing the estimate of the commissioners. The reasons which led the Court to the conclusion that the property owner, although the damages awarded to him were reduced in amount, was still the prevailing party, and entitled to costs were stated by the learned justice (commencing on p. 121), as follows:

"It is to be considered, in the first place, that this is the case of the owner of property taken for public uses by the right of eminent domain under statutes which would be unconstitutional if they did not secure to him the right of trial by jury. It is not to be presumed, without clear words, that the Legislature would afford to the citizen, whose property had been taken against his will, his constitutional right of having his damages assessed by a jury, only upon the condition of paying costs if the jury should assess them at a less sum than that estimated by public officers in whose appointment he had no greater share than any other citizen of the county, and whose estimate could not lawfully be made conclusive upon him."

"Upon the laying out of a highway indeed, which is for the immediate benefit of the whole public, and in no part for the profit of a corporation, it is expressly provided that, if the jury do not increase the damages, the land owner applying for a jury shall pay the costs of the application. Gen. Sts., c. 43, sec. 24, 44; Hamblin vs. County Commissioners, 16 Gray, 256. The railroad act contains no such provision, nor any other distinct allowance of costs against the land owner if any damages are assessed by the jury, except in the single case in which he persists in his application for a jury after a tender to him of the amount estimated by the commissioners, and fails to recover a greater sum. Gen. Sts., c. 63, sec. 35. All other cases fall under the general provision of section 22, that 'upon such application the prevailing party shall recover legal costs.'"

"The words 'prevailing party,' used in this statute, have a well settled meaning in the statutes regulating costs in actions at law. In those statutes, the general rule has long been that 'the prevailing party' shall recover his legal costs against the other. St. 1784, c. 28, sec. 9; Rev. Stat., c. 121, sec. 1; Gen. Stat., c. 156, sec. 1. And the established construction of such statutes is, that if, on an appeal from a lower to a higher court, or a new trial in the same court, the plaintiff finally recovers any damages, though for a less amount than on the first trial, he is entitled to full costs, in the absence of any special restriction by statute. Framingham Manufacturing Co. vs. Barnard, 2 Pick., 532; Sawyer vs. Bancroft, 21 Pick., 210; Stevens vs. Hale, 7 Met., 85; Fitch vs. Stevens, 2 Met., 506; Richardson vs. Curtis, 2 Gray, 497. In no case, we

believe, is a plaintiff, who finally recovers anything in an action at law, obliged to pay costs to the defendant, except when, after not accepting an offer of judgment, he fails to recover a greater sum than that so offered. Gen. Stat., c. 129, sec. 63. His own right to recover costs is indeed restricted in some cases in which he puts the defendant to increased expense by pursuing him in a jurisdiction which the result shows that he was not justified in resorting to; as if he brings a suit in a court of superior jurisdiction, and recovers no more than he might have sued for in an inferior court; or if he appeals from the judgment of an inferior court in his favor, and recovers no greater sum in the court appealed to. Gen. Stat., c. 156, secs. 4, 5; Lakeman vs. Morse, 9 Mass., 126; Abbott vs. Wiley, 17 Pick., 323; Joannes vs. Pangborn, 6 Allen, 243; Heims vs. Ring, 11 Allen, 352. Upon a writ of review, the rule is different, because that is a new action, brought after a final judgment, and a party who does not obtain a more favorable judgment on the review than in the original action is not the prevailing party upon the writ of review. Gen. Stat., c. 146, secs. 33, 34; Williams vs. Hodge, 11 Met., 266.

"An application for a jury, by a party dissatisfied with the estimate of damages by the county commissioners, is not a new action, or a process to reverse or revise a judgment already rendered; but is only a step in the same case, which suspends all proceedings to enforce the award of the commissioners until a verdict has been rendered or the right to a trial by jury waived. Gen. Stat., c. 43, secs. 41-43. The Gen. Stats., c. 63, sec. 22, do not even say that the jury shall 'revise' or 'reassess,' but that they shall 'assess the damages.' The original claim for damages is to be made out by the landowner, and tried by the jury, without any regard to the previous estimate of the commissioners. Connecticut River Railroad Co. vs. Clapp, 1 Cush., 559. If a verdict is returned in his favor, for whatever amount of damages, he is the prevailing party, and as such entitled, under the provisions of the railroad act, to recover costs."

The writs of review referred to are writs under which "final judgments in civil actions may be re-examined and tried anew."

Gen. Stat. Mass., 1860, p. 747, Sec. 19.

Other sections of the statute read:

"Sec. 33. The prevailing party shall recover costs unless the Court in granting the review imposed on the petitioners terms respecting costs."

"Sec. 34. If the sum recovered by the plaintiff in the original suit for debt or damages is reduced on the review, the original defendant shall have judgment and execution for the difference with costs; or, if the former judgment is not satisfied, one judgment may be set off against the other, and an execution issued for the balance. If the original plaintiff recovers a greater sum for debt or damages than was awarded to him in the original suit, he shall have judgment and execution for the excess."

The foregoing examination of the Massachusetts system for the condemnation of private property to the public use by railroad corporations makes it perfectly plain, that the only difference between that system and the system which prevails in New York and Michigan consists of this, that in Massachusetts the first estimate of damages or compensation, as made by the county commissioners, is regarded as a mere preliminary estimate in the same suit or proceeding in which an assessment by a jury may be subsequently had, while in New York and Michigan, the first award is made by commissioners appointed by the Court, or if the property owner so elects, by a jury, and the award so made is, when confirmed, a final judgment, to be acted upon by the parties, and which passes the title and possession of the property; but subject, however, to the right of either party, or both, to have the case reviewed by the Supreme Court of the State on appeal, and as the result of such review to have the case re-examined and tried anew, before the same or new commissioners or jury, substantially the same as an ordinary civil action can be retried in Massachusetts on a writ of review.

Subject to the question, whether under the Constitution of Massachusetts, the property owner is not entitled

to a jury trial in the first instance without running any risk, or being subjected to any burdens, as to costs, there can be no doubt but that the Legislature of that State could make railroad condemnation cases subject to their writ of review system, that is, if the first assessment was required to be by a jury, there could be no constitutional objection to legislation providing for a new or second assessment on a writ of review, and the entry of a judgment against the one party or the other for the difference in the awards, and the recovery of costs by the prevailing party on the review, the same as in civil actions.

The provision for a preliminary estimate by the county commissioners could be retained, and the second estimate, being the first assessment made by a jury, could be made subject to another assessment by a new jury on a writ of review.

And this is precisely what is now done in Massachusetts.

The Public Statutes of Mass., 1882, c. 49, sec. 105, provide that in condemnation cases the parties, instead of having a sheriff's jury, may have a trial at the bar of the court in the same manner as other civil cases are there tried by jury, and it has therefore been held, that the judgment of the Superior Court upon the verdict of the jury assessing damages upon the petition of one whose land has been taken for a railroad is a judgment in a "civil action" within the meaning of the statute authorizing writs of review.

Nantasket Beach R. R. Co. vs. Ransom, 147 Mass., 240.

The provisions providing for the entry of judgments to adjust the differences and giving costs to the prevailing party on the review, as construed in Williams vs. Hodge, 11 Met., 266, remain unchanged.

Public Stat. of Mass., 1882, p. 1080, Secs. 34, 35.

The act authorizing a trial at the bar of the court instead of a trial before a sheriff's jury was first passed in 1873.

Laws of Mass., 1873, C. 261.

So that since 1873 the Massachusetts procedure in railroad condemnation cases, has been identical with that in New York and Michigan in this particular, that the first assessment made by a jury is regarded when confirmed as a final judgment, but which judgment is subject to the results of another assessment on a writ of review; and costs are awarded to the prevailing party on the review, without regard to which was the prevailing party on the first or original assessment.

That provision for the review of final judgments in railroad condemnation cases has been made in Massachusetts as well as in New York without a suggestion in either State that the constitutional guaranties for the protection of private property have been violated, is some evidence that the Michigan general railroad and union depot acts in providing for such reviews, are not obnoxious to the constitutional safeguards which prevail in all the States, and the continuance of which is rendered imperative by the Fourteenth Amendment.

Wisconsin is another State where the legislation as to costs in railroad condemnation cases is the same as that of Michigan. The Wisconsin statute provides for a determination of the amount of the compensation or damages by commissioners, but gives the parties the right to appeal to the Circuit Court and to there have a jury trial. The statute provides that in these cases "costs shall be allowed to the successful party *on such appeal*, and if in favor of the plaintiff be added to the amount of the verdict; if in favor of the defendant be deducted therefrom; and judgment shall be rendered thereon according to the rights of the parties."

In Washburn and others vs. Milwaukee & Lake Winnebago R. R. Co., 59 Wis., 364, 378, the Court, in an opinion by Lyon, J., quoted the above statute and then said:

"This statute admits of but one rational construction, which is that the plaintiff is the successful party, if on his appeal the award of the commissioners is increased, or, on the appeal of the defendant company, if it is not reduced. Otherwise the defendant is the successful party. In the *Stringham cases* both parties appealed and the respective awards of the commissioners were reduced. The defendant was, therefore, the successful party and entitled to costs."

Alabama and Georgia legislation to the same effect was sustained by the affirmance of a judgment thereunder by the Supreme Court of Georgia. The charter of the Selma, Rome and Dalton Railroad was originally granted by the State of Alabama, and adopted by the State of Georgia. It provided that the value of land taken by the company for the purposes of its road should be determined by a sheriff's jury under a writ of *ad quod damnum*, but the parties were given the right to appeal to the Superior Court and to there have a jury trial *de novo*. The charter further provided that the appealing party should give bond "conditioned to pay the party appealed against all the costs of the trial *de novo*, as well as the costs of the writ of *ad quod damnum*, in the event that the finding of the jury in the trial *de novo* shall not be more favorable to the appealing party than the finding of the jury under the writ of *ad quod damnum* in the first instance," and that "if the trial *de novo* on the appeal shall not be more favorable to the appealing party than the original trial and verdict the party appealing shall pay all the costs of the whole proceeding," and again that "costs shall be paid by the company except in cases where appeal is taken, in which cases the costs to abide the result of the trial in the Circuit (Superior) Court as hereinbefore provided."

In Leak vs. Selma, Rome & Dalton R. R. Co., 47 Ga., 345, the sheriff's jury returned a verdict of $1,500, which was reduced by the jury in the Superior Court to $900, on an appeal by the company.

Held, that the owner of the land must r[illegible] the costs of the proceedings on appeal.

The Indiana Constitution of 1851 contains this provision:

"No man's property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

Art. 1. Sec. 21.

In Lake Erie & Western Ry. Co. vs. Kinsey, 87 Ind., 514, appraisers assessed the damages of the property owner at $50, which was deposited by the company with the clerk of the court as provided by statute, before the company took possession. The property owner appealed, and in a trial before a jury he obtained a verdict for $790, and a judgment was rendered thereon. The judgment remained unpaid for some six months, when the property owner brought ejectment.

Held, that the property owner was entitled to recover possession.

The Court, at p. 517, said:

"Appellant insists that, under this statute, when it paid into the clerk's office the $50 awarded by the appraisers, the title to the land immediately passed to the appellant; and the fact that the appellee was awarded a much greater amount on the appeal makes no difference; that the title had already vested in appellant, and appellee must look to his judgment for compensation.

"Such a construction of the statute would be in conflict with the Constitution, and would make it unconstitutional and void in his respect. But we think the statute plainly admits of a construction that makes it in harmony with

the constitutional provision that just compensation shall be first made or tendered.

"The payment of the amount awarded by the appraisers gives the corporation a right to the immediate possession and a prima facie claim to the land subject to an appeal in ten days after the award is filed. If no appeal is taken, at the end of the ten days the title vests and relates back to date of payment. If an appeal is taken no title vests, and the corporation has no greater right than that of a license under the statute to hold possession and proceed with the construction of its road pending litigation. When the compensation has been finally fixed on appeal, then the corporation must pay or tender the compensation so fixed, and on failure to do so it acquires no title to the land, and its license to hold possession and prosecute its work ceases. Just compensation must be first made or tendered. The verdict of the jury and the judgment of the Court determine what that just compensation is."

The Kansas Constitution of 1859 contains the following provision:

"No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation."

Art. 12, Sec. 4

The only difference between this provision and that of the Michigan Constitution is that in Kansas the only constitutional way of giving the land owner security is by a deposit of money, and it is not competent to give a bond or any security other than a deposit of money, as it is in Michigan.

A Kansas statute passed in 1864 made the award of commissioners final, and did not permit any appeal. In 1868 an act was passed allowing an appeal, but in 1870 this act was amended so as to limit the scope and effect of the appeal, as follows:

"And an appeal shall be had from the determination of the Board of County Commissioners as to the value of the land, crops, buildings and other improvements on said land, and for all other damages sustained by such person or persons by reason of such right of way so appropriated, in the same manner as appeals are granted from the judgment of a justice of the peace to the District Court; and said appeal and all subsequent proceedings shall only affect the amount of compensation to be allowed, but shall not delay the prosecution of the work on said railroad, upon said company paying or depositing the amount so assessed by said commissioners with the County Treasurer of the county within which the said lands are situated; and upon the payment or deposit, as aforesaid, of the amount so assessed by said commissioners, and upon said company executing a bond with sufficient security, to be approved by the County Clerk, to pay all damages and costs which said company may be adjudged to pay by said District Court, said company may, notwithstanding said appeal, take possession of and use the said land and construct its road over the same."

The constitutionality of this statute was sustained by the Supreme Court of Kansas in an opinion delivered by Brewer, J., now one of the Judges of the Supreme Court of the United States.

C. B. U. P. R. R. Co. vs. A., T. & S. F. R. R. Co., 28 Kan., 453.

The grounds of the decision were:

(1.) That the appeal was a matter of favor and not of right, and the property owner could only appeal on such terms as the Legislature of the State saw fit to impose.

(2.) That the possession the company was allowed to take pending the appeal, upon paying or depositing the amount awarded by the commissioners, was provisional only, and if the company did not promptly pay any increased damages allowed in the District Court its provisional occupation of the land would cease to be lawful

and the land owner could recover possession as well as all damages for the injuries done to the land.

Judge Brewer concluded his opinion as follows:

"We have given this question the fullest consideration and our conclusion upholds the validity of this statute. We think the constitutional guaranty has been satisfied by it both in letter and spirit; that the rights of the land owner are protected, and at the same time no unreasonable obstruction placed in the way of railroad enterprises."

The Iowa Constitution of 1857 provides:

"Private property shall not be taken for public use without just compensation first being made, or secured to be made, to the owner thereof as soon as the damages shall be assessed by a jury."

Art. 1, Sec. 18.

A statute authorized a railroad company on depositing the amount awarded to the property owner by a sheriff's jury to take possession and construct its road, and then to take an appeal and obtain a reassessment. It was not required to give any security further than to deposit with the sheriff the amount of the first award.

In Peterson vs. Ferreby, 30 Ia., 327, the Court quoted the statutory provisions and answered the constitutional objection to them as follows:

"Day, J. The record presents but a single question, to wit: Does an appeal by a railroad company, from the assessment by sheriff's jury of damages for right of way, suspend, until the case is heard upon appeal, the payment to the landowner of the amount assessed and deposited with the sheriff? We feel constrained to answer this question in the affirmative. Railroads are works of great public convenience and necessity. Their construction requires much time, and involves the employment of great numbers of workmen. The work can be successfully prosecuted only through the intervention of contractors who undertake the building of specified portions. When

once begun, it is of the utmost importance that it be prosecuted without interruption or delay. Hence the law has wisely provided a summary mode in which damages for right of way may be primarily assessed, saving to either party the right to a more deliberate and careful adjudication upon appeal. But, in order that the company may not be subjected to vexatious delays, it provides that, under certain conditions, the appeal shall not suspend the prosecution of the work. The provision of the statute is as follows: 'If said corporation shall, at any time before they enter upon said real estate for the purpose of constructing said road, pay to said sheriff, for the use of said owner, the sum so assessed and returned to him as aforesaid, they shall be thereby authorized to construct and maintain their railroad over and across said premises: provided, that either party may have the right to appeal from such assessment of damages to the District Court of the county where such lands are situated, within thirty days after such assessment is made. But such appeal shall not delay the prosecution of the work upon said railroad, if said corporation shall first pay or deposit with the Sheriff the amount so assessed by said freeholders * * *.' Rev. Sec. 1317.

"This section, in direct terms, gives to the railroad company the right of appeal, and provides that, while the appeal is pending, the work may progress. But to this end, it is incumbent upon the company to deposit with the sheriff the amount assessed. The appeal would be shorn of half its benefits if the railroad, in order to adopt its provisions, is forced to an election, either to forego the prosecution of the work, or run the risk of recovering from the land owner the diminution of the damages upon appeal. It would be a novel construction, to hold that a party must satisfy a judgment before he can prosecute an appeal from it. The language of the section above referred to furnishes no basis for such a construction. It leads to the opposite conclusion. The former part of the section provides, that the corporation shall be authorized to construct and maintain their railroad over the premises, if they shall, at any time before they enter upon said real estate for the purpose of constructing the road, pay to said sheriff, for the use of said owner, the sum so assessed. But the portion of the section applicable to appeal provides that such appeal shall not delay the prose-

cution of the work, if said corporation shall first pay or deposit with the sheriff the amount so assessed. The difference in phraseology is material, and cannot be considered as the result of mere accident.

"The views herein expressed are not in conflict with the Constitution, which provides that 'Private property shall not be taken for public use without just compensation first being made, or secured to be made, to the owner thereof, as soon as the damages shall be assessed by a jury.' Const., art. I., sec. 18.

"The property is not taken, in an absolute sense, until the amount assessed upon appeal is paid. If the appellate jury, in this case, shall assess less than the sheriff's jury have assessed, the amount is secured to plaintiff, being in the sheriff's hands; if they shall assess more, the plaintiff can, by injunction, prevent the absolute appropriation of his property, until the increased sum is paid. Richardson vs. Des Moines Valley Railroad Co., 18 Iowa, 260.

"In either event, the landowner is fully protected. We are clearly of the opinion that the money paid the sheriff should remain a deposit in his hands, until the damages are finally assessed in the Appellate Court."

The Missouri Constitution of 1875 contains this provision:

"That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested."

The statutes of Missouri provide for an original or first assessment by the majority of three commissioners. Upon payment of the amount awarded by the commissioners to the clerk of the court, the railroad company is authorized to proceed with the construction of its road, and "to hold the interest in the property so appropriated for the uses aforesaid." Either party is authorized to file

exceptions to the report of the commissioners, and the Court is given power to review the report and to "make such order therein as right and justice may require, and may order a new appraisement upon good cause shown."

"Such new appraisement shall, at the request of either party, be made by a jury, under the supervision of the Court, as in ordinary cases of inquiry of damages; but notwithstanding such exceptions, such company may proceed to * * * construct said road or railroad; and any subsequent proceedings shall only affect the amount of compensation to be allowed."

In St. L. & S. F. Ry. Co. vs. Evans & Howard Brick Co., 85 Mo., 307, two of the three commissioners reported awards of $50,000 and $25,900, to two different owners. The third commissioner reported in favor of allowing $4,000 and $12,000 to these owners, respectively. The railroad company filed exceptions to the majority report, but paid to the clerk of the court the amounts awarded, and took possession of the property. Upon these facts the Circuit Court refused to hear the exceptions and entered an order directing the clerk to pay the awards to the property owners. On appeal to the St. Louis Court of Appeals the order of the Circuit Court was affirmed; but on error from the Supreme Court of the State it was reversed.

At page 326 the Court quotes the constitutional provision, and after referring to a rule of constitutional interpretation laid down by Judge Story, continues:

"In the first place, it would be doing violence to all known rules of interpretation to assume that those who framed and those who by their votes adopted our Constitution, were actuated by no intelligent purpose in that behalf. On the contrary, it must be assumed that they were familiar with the vicissitudes incident to condemnation proceedings and with the statutory provisions relating thereto; familiar with the fact that sometimes the land desired to be taken is not appraised at a suf-

ficiently large sum, and, therefore, the land owner files his exceptions; familiar with the fact that sometimes such land is appraised and the damages of the owner assessed at an exorbitantly large sum, and, therefore, the corporation, desiring to appropriate the land, files its exceptions; familiar with the fact that contests arise on the hearing and trial of these exceptions, and that frequently appeals are taken by the unsuccessful party to the court of last resort, to the end that the litigated matter may be finally adjudicated; familiar with the fact that such appeals cause delay; familiar with the fact that it concerns the public welfare that the enterprise of railroad building should not be retarded, and cannot be retarded without injuriously affecting the interests and prosperity of large communities in this State; familiar with the fact that in order to determine what the land proposed to be taken is worth, and how much the owner of it will be damaged by the taking, an imperious necessity exists that the precise strip of land required, its dimensions, etc., should first be ascertained, and that such strip should be marked out and sufficiently designated in order that those appointed to appraise it and assess the damages accruing to the land owner, can intelligently perform their work after they shall have 'viewed the property.' Taking all these things into consideration, as must be presumed to have been done by the framers and adopters of our Constitution, it does not seem difficult to reach a correct conclusion as to the meaning of the words employed. If the words, 'paid to the owner, or into court for the owner,' be taken in a literal sense, it cannot be doubted that the plaintiff company has brought itself within the very terms and letter of the organic law; the money has been 'paid * * * into court for the owner.' But grant that the words are not to be taken literally, and the result is not changed, if they are to be taken in their 'usual and most known signification' (1 Sto. Const., sec. 400), taken in the light of an intelligent purpose prompting those who used and those who adopted them. Viewed in this light, it is easy to discern the object contemplated by those who employed them and the reason they were employed. The very fact that they were employed, in and of itself, discloses a knowledge, on the part of the framers of the Constitution, of the frequent necessity, arising in the progress of condemnation proceedings, of paying money

'into court for the owner,' there to await the ultimate determination of the suit."

The Court, after answering the contention that the clause permitting payment into court for the owner was evidently intended as a provision for cases where the owner might refuse payment when tendered or might be unknown or not sui juris, proceeded to quote the different provisions of the statute, and then stated the conclusions of the Court as to their validity as follows:

"After a very careful examination of the section of the Constitution before quoted and a comparison of it with the statutory provisions already set forth, I have been unable to discover any necessary incongruity or repugnancy between the Constitution and the statute. The statute must, therefore, on the grounds stated, be held prima facie valid, and that the manner which it prescribes for ascertaining the compensation to be awarded to a land owner as possessed of equal validity. The manner in which the jury or commissioners shall ascertain the quantum of compensation is left entirely to the Legislature; that manner or method prescribed may well include all the necessary detail of motions and exceptions to the insufficiency or the exorbitancy of the amount of damages assessed, and the appointment of new commissioners or another jury 'as right and justice may require.' There is certainly nothing repugnant to the Constitution in prescribing such details; on the contrary, it is in furtherance of the constitutional mandate requiring that 'just compensation' be made. This embraces all means necessary to that end, not inconsistent with the Constitution. Nor is any incongruity apparent between the different sections of the statute. In Ring vs. Mississippi Bridge Company, 57 Mo., 496, it was ruled that section 3, which now corresponds with section 894, and section 4, which now substantially corresponds with section 896, should be construed together, and that the corporation, having paid the money to the clerk for the owner, might still except; but notwithstanding such exceptions, having made full compensation, as aforesaid, might still proceed with the construction of the road and the subsequent proceedings would only affect the amount of compensation to be allowed."

The California Constitution of 1879 provides:

"Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner," etc. Art. I., sec. 14.

Supplementary to this constitutional provision the California code of civil procedure provides that in all condemnation cases, before the property can be taken, it must appear that the use to which it is to be applied is a use authorized by law, and that the taking is necessary to such use. 3 Deering's Codes and Statutes of Cal., sec. 1241.

It is further provided that when the damages have been assessed, and a judgment of confirmation has been entered, upon paying "into court, for the defendant, the full amount of the judgment and such further sum as may be required by the Court as a fund to pay any further damages and costs that may be recovered in said proceeding, as well as all damages that may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use," the plaintiff may, if already in possession, continue therein, and if not in possession, he may take possession and use the property "during the pendency of and until the final conclusion of the litigation." The trial Court is authorized to grant a new trial, but if it is granted on the application of the defendant and he does not obtain a greater compensation than was allowed him upon the first trial, the costs of the new trial are taxed against him. Either party may appeal to the Supreme Court. Pending a motion for a new trial, or an appeal, defendant is allowed to draw the money deposited for him upon the judgment, if he abandons all defenses except his claim for a greater compensation. Id., secs. 1254, 1257.

In Spring Valley Water Works vs. Drinkhouse, 92 Cal., 528, the property owner appealed to the Supreme Court

on the questions of public use and necessity, and also on the ground of error in assessing the damages. The Court decided against him on the question of public necessity, but found error in the proceedings to assess the compensation. The Court below was directed to retry the issues as to the value of the land sought to be taken. At page 532 the Court said:

"There is no doubt of the proposition, that before land can be taken for a public use, it must appear that the taking is necessary for such use. This is a question of fact to be determined by the Court or jury in view of all the evidence in the case, and the burden of proof is upon the plaintiff. The evidence must be sufficient to show that the land is reasonably required for the purpose of effecting the object or carrying on the business for which the plaintiff was organized, and in this case not only the present demands of the public upon the plaintiff, but those which may be fairly anticipated on account of the future growth of the city, are to be considered. We think the evidence was sufficient to show a necessity for the taking of defendant's land within the meaning of the law, and we cannot disturb the finding of the Court below on that point."

After the Court had made the decision granting a new trial of the question of damages, the property owner petitioned the Court for a writ of restitution to restore to him possession of the property taken. In denying this petition the Court referred to the statute providing for a transfer of possession after confirmation of the first award on a deposit of money into Court, and also to the constitutional provision, and then continued as follows:

"It would seem that the framers of both the Constitution and the statute had in view the delays incident to condemnation proceedings, and the necessity in many cases of allowing property to be taken and used for a public use during the progress of the litigation, provided an adequate fund to fully reimburse the land owner was first paid into Court. This construction of a quite similar

provision of the Constitution of the State of Missouri was fully adopted in the case of St. Louis, etc., R'y Co. vs. Evans and Howard Brick Co., 85 Mo., 326. It is conceded that respondent's possession of the premises was lawful down to the time of the reversal of the judgment; the authorities are uniform to that extent. Now, the order of the Court, made in the language of the statute, gave respondent possession of the premises 'during the pendency of and until the final conclusion of the litigation;' if the Legislature had the power by statute to give the possession of the premises to the respondent pending proceedings upon appeal, under certain conditions and limitations, it had the same power to extend respondent's possession 'until the final conclusion of the litigation.' The latter clause is no more violative of the constitutional provision than the former. These views are fully supported in Lake Erie, etc., R'y Co. vs. Kinsey, 87 Ind., 514."

Spring Valley Water Works vs. Drinkhouse, 95 Cal., 220, 223.

The Constitution of Montana provides:

"Private property shall not be taken or damaged for public use without just compensation having been first made or paid into court for the owner."

Art. 3, Sec. 14.

The Montana code of civil procedure provides for an assessment of damages before commissioners, with the right of appeal to the District Court and an assessment of the damages by a jury. If the appeal is taken by the property owner and he does not succeed in increasing the award he is required to pay costs to the appellee. Sec. 2224. Further appeal to the Supreme Court of the State is allowed, where the costs, if a new trial is ordered, are in the discretion of the Court. Secs. 1722, 1855.

Other provisions governing the proceedings in the District Court on appeal from the award of the commissioners are as follows:

"§ 2229. At any time after the report and assessment of damages of the commissioners has been made and filed in the Court, and either before or after appeal from such assessment or from any other order or judgment in the proceedings, the Court or any judge thereof at chambers, upon application of the plaintiff, shall have power to make an order that upon payment into Court for the defendant entitled thereto of the amount of damages assessed, either by the commissioners or by the jury, as the case may be, the plaintiff be authorized, if already in possession of the property of such defendant sought to be appropriated, to continue in such possession; or, if not in possession, that the plaintiff be authorized to take possession of such property and use and possess the same during the pendency and until the final conclusion of the proceedings and litigation, and that all actions and proceedings against the plaintiff on account thereof be stayed until such time: provided, however, that where an appeal is taken by such defendant, the Court or judge may in its or his discretion require the plaintiff, before continuing or taking such possession, in addition to paying into Court the amount of damages assessed, to give bond or undertaking, with sufficient sureties, to be approved by the judge and to be in such sum as the Court or judge may direct, conditioned to pay defendant any additional damages and costs over and above the amount assessed, which it may finally be determined that defendant is entitled to for the appropriation of the property, and all damages which defendant may sustain if for any cause such property shall not be finally taken for public uses. The amount assessed as damages by the commissioners or by the jury on appeal, as the case may be, shall be taken and considered, for the purposes of this section, until re-assessed or changed in the further proceedings, as just compensation for the property appropriated; but the plaintiff, by payment into Court of the amount assessed, or by giving security as above provided, shall not be thereby prevented or precluded from appealing from such assessment, but may appeal in the same manner and with the same effect as if no money had been deposited or security given; and in all cases where the plaintiff deposits the amount of the assessment and continues in possession or takes possession of the property as herein provided, the defendant entitled thereto, if there be no dispute as to the ownership

of the property, may at any time demand and receive from the Court the money so deposited, and shall not by such demand or receipt be barred or concluded from his right of appeal from such assessment, but may, notwithstanding, take and prosecute his appeal from such assessment; provided, that if the amount of such assessment is finally reduced on appeal by either party, such defendant who has received the amount of the assessment deposited shall be liable to the plaintiff for any excess of the amount so received by him over the amount finally assessed, with legal interest on such excess from the time such defendant received the money deposited, and the same may be recovered by action; and provided, further, that upon any appeal from assessment of damages by the commissioners to a jury, the jury may find as compensation or damages a less as well as an equal or greater amount than that assessed by the commissioners."

"§ 2230. Costs may be allowed or not, and if allowed may be apportioned between the parties on the same or adverse sides, in the discretion of the Court."

In State vs. McHatton, 15 Mont., 159, a railroad company commenced proceedings to condemn private property to the public use. The three commissioners appointed by the District Court awarded the owner $6,400. The company deposited the said sum in Court and applied for an order allowing it to take possession pending the final determination of the proceeding. About the same time the property owner appealed from the award of the commissioners and resisted the application of the company for an order allowing it to take possession. The Court granted the order permitting the company to take possession.

On certiorari to review this order the Supreme Court of the State duly affirmed the same, and stated the question and the grounds of its decision as follows:

"Relator insists that the District Court exceeded its jurisdiction in allowing said railway company possession of the ground proposed to be taken and appropriated for

such right of way previous to the final determination, and deposit of the amount awarded as damages, because Section 14 of Art III. of the Constitution of this State provides that 'private property shall not be taken or damaged for the public use without just compensation having been first made to, or paid into Court for, the owner.' This is the pivotal point of contention. The view insisted on by relator is, that no just compensation has been ascertained and deposited in this case, because its appeal has, in effect, abrogated and set aside the commissioner's award, and leaves the payment of said six thousand four hundred dollars into Court as a fact without vital force, and it is not a compliance with the exaction of the Constitution in such a case.

"Upon mature consideration of this question, and the authorities relating thereto, we are unable to concur in relator's view. The compensation has been fixed by the tribunal instituted by law for that purpose as the just compensation for the damage proposed. The authorities hold that award to be a substantial fact which fixes the just compensation to which relator is entitled, until revised on appeal. (Lewis on Eminent Domain, § 581, and authorities cited in respondent's brief.) This is reasonable. The compensation has been determined by the tribunal thereunto authorized, and although there be a right of appeal to resubmit the question of damage, that appeal may never be prosecuted to effect, in which event the original award would remain as the just compensation ascertained and deposited in such case; but the most that can be done on appeal in favor of the party whose property is to be taken for public use is to add something to the award already made, but until that is formally done it cannot be reasonably held that no award has been made. The first award and deposit may exceed what the jury or Court may award on determination of the appeal. In that event the deposit would not only equal the amount first awarded, but would more than answer for the just compensation finally determined. It should also be borne in mind in this consideration that the order for possession on review here is not final. It is temporary, and the whole subject matter, together with the thing sought to be condemned, is within the jurisdiction of the Court, and therefore the taking of the property, or the ultimate divestiture of the owner thereof, has not been consummated, but

only temporary possession given. In treating a similar case (Central Branch, etc., Ry. Co. vs. Atchison, etc., Ry. Co., 28 Kan., 453), Mr. Justice Brewer, delivering the opinion of the Court, said: 'The occupation of the land by the railroad pending the appeal is provisional merely; its entry is not a permanent appropriation of the right of way, and it acquires by such entry no vested rights.' Surely an award, considered in the judgment of the commissioners to be just compensation in lieu of complete deprivation or of continued use of the property condemned, must be sufficient deposit to answer for the temporary possession granted by the Court on deposit of the first award. If the award should be increased through the trial on appeal, there will be no final judgment confirming to the railway company the right of way proposed to be condemned, until deposit or payment of the additional amount, and, in default of such additional payment, the Court having jurisdiction of the subject matter and the parties would oust the party seeking to condemn the property from the temporary possession which the Court had given, and mete out to the owner adequate damage for temporary use and injury, applying the deposited sum thereto. In our opinion these conditions fulfill the exactions of the Constitution. Moreover, the statute provides that, where temporary possession is sought before final determination of the proceeding, the Court, before granting such temporary possession, shall exact a bond, conditioned for payment of all further compensation and damages which may be awarded to the owner of the premises. This would afford the owner another remedy which he might elect to pursue if desirable. The statute of our State on the subject of eminent domain, enacted prior to the Constitution, as well as an amendment thereto adopted since, authorizes the Court to let the party seeking condemnation into temporary possession and use, on certain conditions *falling short of the payment or deposit in Court required by the clause of the Constitution above cited. These statutes, however, provide the procedure in such cases; but in so far as they provide for giving possession without fulfilling the exactions of the Constitution, we hold them insufficient.* The constitutional provisions must be complied with before the Court is authorized to let the party seeking condemnation into possession. The trial Court required this before granting the order for

temporary possession in the case at bar; and, having required the deposit provided for by the Constitution, the Court granted the order for temporary possession, proceeding therein as provided by statute.

"We find no ground for reversal or modification of the order of the trial Court, complained of, and therefore affirm the same."

FOURTH ANSWER.

The Michigan legislation in question expressly provides that if the amount of the compensation is increased by the second report or verdict the difference shall be a lien on the land appraised, that is, on the land taken, and it shall be paid to the parties entitled to the same.

No express statutory declaration was necessary to create this lien. It has been held in Massachusetts that the right of the owner of the land taken to compensation, if not strictly a lien, has at least the nature of a lien or encumbrance upon the land taken which may be enforced against the corporation and its assigns as superior to any subsequent rights.

Drury vs. Midland R. R. Co., 127 Mass., 571.

The property owner having received a part of his compensation, cannot very well insist that the real estate taken will not be adequate security for the balance of his compensation.

It appears, therefore, that the statute furnishes to the property owner the security required by the Michigan Constitution, and that he has no possible ground for complaint on the theory that he is not secured.

In this connection it must be remembered that in addition to the lien given by the statute, the property owner would also be entitled to enjoin the company from using

the property condemned, until the increased compensation was paid.

In Bricket vs. Haverhill Aqueduct Co., 142 Mass., 394, the company was authorized by an act passed in 1867 to take private property, for the purpose of supplying the town of Haverhill with water by an aqueduct, and the act provided that "all damages sustained by entering upon and taking land, water or water rights for either or any of the above purposes, shall, in case of disagreement with the parties injured, be ascertained, determined and recovered in the same manner as is now provided in cases where land is taken for highways."

The act was claimed to be unconstitutional and invalid because it did not make adequate provision for the recovery of damages by the property owner.

The Court disposed of the objection as follows:

"The Constitution provides that, 'whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.' Declaration of Rights, art. 10. Undoubtedly, a statute which attempts to authorize the appropriation of private property for public uses, without making adequate provision for compensation, is unconstitutional and void. Connecticut River Railroad vs. County Commissioners, 127 Mass., 50, and cases cited. But the Statute of 1867 does not undertake to do this. It provides, in substance, that the corporation shall be liable to pay all damages for injury to private property, and specifies a sufficient remedy to enable the person injured to recover such damages. We are not aware of any case in which it has been held that such provisions are not a sufficient compliance with the requirement of the Constitution. The instances are numerous in which aqueduct companies have been incorporated by statutes which contain the same provisions for securing compensation. The successive legislatures, in these statutes, recognized the constitutional obligation to make adequate compensation, and deemed that such provisions did, with practical certainty, secure the rights of individuals whose property was taken or injured.

"They undoubtedly took into consideration, not only the special remedy provided by each statute, but the other rights and remedies which an individual would have under the general laws, if his damages were not paid after they were ascertained. Take the case before us. If the plaintiff, or any person injured, had, upon proper application, had his damages ascertained, he would be entitled to a warrant of distress to compel the payment of them. Pub. Sts., c. 110, sec. 18. If this was ineffectual, and the defendant still refused to pay, without doubt this Court would, by proceedings in equity, restrain the defendant from a further use of the water, and, if necessary, order the removal of the dam.

"The question whether the provision for compensation furnished by the statute is an adequate one is a practical question. It seems to us that the remedy which the statute in question furnishes against the corporation, supplemented by the remedies afforded by the general laws, if it refuses to pay the damages assessed, affords to any person whose property is taken or injured by the acts of the corporation a reasonable certainty that he will recover and receive compensation therefor. We are not, therefore, prepared to hold that the statute is unconstitutional, because it does not make adequate provision for compensation."

FIFTH ANSWER.

While the statute provides that the title to property taken and the right to the possession shall pass on the payment or deposit of the first award made by the commissioners or a jury, it is equally explicit and positive that if as a result of a new trial the award is increased, the increase "shall be paid by the company to the parties entitled to the same, or shall be deposited as the Court shall direct."

If the company should refuse to pay or deposit the increase in the award as directed by the Court, the inevitable consequence would be that the title and the right of possession vested in it by the payment of the award first

made would be defeated, and such title and right of possession would be again vested in the owner.

The statute provides that on the payment of the first award the owners and others interested "shall be divested and barred of all right, estate and interest in such real estate, franchise or other property until such right or title shall be again legally vested in such owner."

Under this legislation the title and right of possession which first pass to the company are provisional and conditional, and do not become fully operative and final until the payment of any subsequent increase of the compensation on a new trial.

Cherokee Nation vs. Southern Kansas R. Co., 135 U. S., 641, involved the construction of an act of Congress which provided that three referees appointed by the President should in the first instance determine the compensation to be paid for land taken by a railroad company. Either party was entitled to appeal from the decision of the referees, and the company on paying into court double the amount of their award, to abide the result of the appeal, was authorized to take possession.

It was urged against the validity of this act that the trial de novo on the appeal, might result in an award greater than the amount deposited in Court, and the property owner would have no security for the excess.

The Court, in an opinion by Mr. Justice Harlan, after referring to Kennedy vs. Indianapolis, 103 U. S., 599, 604, said:

"In the case now before us the property in respect to which the referees made the award will be conditionally appropriated for the public use when the defendant makes a deposit in court of double the amount of such award, and it only remains to fix the just compensation to be made to the owner. But the title has not passed, and will not pass, until the plaintiff receives the compensation ultimately fixed by the trial de novo provided for in the statute. So that, if the result of that trial should be a

judgment in its favor in excess of the amount paid into court, the defendant must pay off the judgment before it can acquire the title to the property entered upon, and, failing to pay it within a reasonable time after the compensation is finally determined, it will become a trespasser, and liable to be proceeded against as such. And, in such case, if the plaintiff shall sustain damages by reason of the use of its property by the defendant pending the appeal, the latter will be liable therefor. The apprehension, therefore, that the plaintiff may lose its property without receiving just compensation therefor, is without foundation."

The case of Kennedy vs. Indianapolis, 103 U. S., 599, involved a construction of the provision of the Constitution of Indiana of 1816 that no man's property should be taken for public use "without a just compensation being made therefor."

The Court in an opinion delivered by Mr. Chief Justice Waite examined the Indiana cases, and made the following statement of, and quotation from, Hankins vs. Lawrence, 8 Blakf., 256:

"That was a case in which the White Water Valley Canal Company had acquired the title of the State to the White Water Canal, one of the works the board of internal improvements was authorized to construct under the act of 1836, and the question was whether it could, under its charter, enter upon lands to complete that canal, for the purposes of its incorporation, without first having made just compensation, to the owner. Upon this the Court said: 'The question whether payment must be made before the land is taken and used * * * has been already decided by this Court. * * * The possession and use of the land in question by the White Water Valley Canal Company are upon the condition subsequent, that they will not be in default with respect to the payment of the same, as prescribed by the charter, nor with respect to the erecting of the works for which the land is taken. It may be that, should any person claiming under the company remain in possession of the land after a default in such payment, or in erecting the works, he would be considered as a trespasser ab initio.' So far as

we have been advised, these cases are still the law of Indiana, and they are certainly supported by high authority."

Reference is then made to the following cases:

Rexford vs. Knight, 11 N. Y., 314.
Nichols vs. R. R. Co., 43 Me., 359.
Cushman vs. Smith, 34 Me., 258.

While the Michigan statute in question in this case does provide that the title shall pass as the result of the payment of the award first made and confirmed, it is contemplated by the statute, and such is its correct construction, that the title passes subject to the condition subsequent, that prompt payment is to be made of any increase in the award resulting from a new trial and a reassessment of the damages or compensation.

The State is under no obligation to provide for any appeal in condemnation cases, and if it did not, the first award would be conclusive and final. It cannot very well be held that the State violates the constitutional guaranties of the Fourteenth Amendment, because it provides that that first determination of the compensation which it might have made final, is to be treated and regarded as prima facie and temporarily correct, and legally sufficient to authorize a transfer of the title and possession, that is, that the parties may act upon the same as final, until it has been reviewed on a new trial, and an increase or decrease has been had. It is not altogether clear that the State is under the same constitutional obligation to make provision for, or to secure the payment of, the increase as it was under to make provision for or to secure the payment of the original award. Legislation providing that the first award shall be conclusive and final, but reserving to the parties the privilege of obtaining an increase or decrease in the compensation,

and giving them the usual legal remedies of judgments and executions, for the recovery of the same, would seem to be more of a limitation upon the right of appeal or review, than a deprivation of rights of property without due process of law.

Legislation securing to the property owner the same rights and remedies to enforce payment of an increase in his compensation, as must be and is accorded to him to compel payment of the compensation first awarded, cannot possibly violate his constitutional rights.

II.

The jury of freeholders provided by the Constitution and laws of Michigan for the trial of condemnation cases was intended to be and is a common law jury.

By the express requirement of one provision of the State Constitution, and the legal meaning of the word "jury," in another provision of that instrument, the jury must consist of twelve jurors.

Art. XVIII., Sec. 2; Art. XV., Sec. 15.
Campau vs. Detroit, 14 Mich., 276.
Pearsall vs. Eaton Supervisors, 71 Mich., 438, 446.

The verdict of the jury must be unanimous.

Chicago & Mich. L. S. R. R. Co., vs. Sanford, 23 Mich., 418.

Neither of the parties or their counsel can be permitted to participate in the deliberations of the jury by giving advice or counsel or aiding in drawing up their verdict.

Paul vs. Detroit, 32 Mich., 108, 114, 117.

The right to a challenge for cause cannot be taken away by statute.

Kundinger vs. Saginaw, 59 Mich., 355, 364.

III.

The Michigan condemnation jury, as a common law jury, or the equivalent of one, is subject to control, instruction and direction by the Court, the same as a common law jury in civil actions, or they may be permitted to sit out of Court, or to act independently of the Court, the same as a sheriff's or coroner's jury in common law inquests.

The Michigan Union Depot Act, and the general railroad law of the State both provide that the judge of the Court, or a Circuit Court Commissioner to be designated by him, *may* attend the jury to decide questions of law and administer oaths to witnesses. The judge also appoints the sheriff or some other proper officer to attend and take charge of the jury while engaged in the proceedings.

1 How. Stat. of Mich., p. 893, Sec. 3466; p. 851, Sec. 3335.

This is nothing more than the sheriff's jury of English law, and of many American States, with the additional safeguard that a judicial officer may attend the jury to swear the witnesses, rule on questions of evidence, and advise the jury on questions of law.

The sheriff's jury, without the attendance of a judicial officer, was well known in the early history of Michigan.

The first act providing for the condemnation of private property to the public use by a railroad corporation was passed by the Territorial Legislature in 1832.

Territorial Laws of Michigan of 1832, p. 68.

The company was authorized to apply to any justice of the peace of the county who was to "thereupon issue his warrant under his hand and seal directed to the sheriff of said county, or if the sheriff was interested, to some disinterested person, requiring him to summon a jury of twelve freeholders in the county not in any way interested in the matter, or related to the parties, to meet on or near the property or materials to be valued on a day named in said warrant," etc.

Each party was permitted to strike off three names, and the six remaining persons constituted the jury to make the appraisement. They were sworn by the sheriff and were required to reduce their inquisition to writing and file it in the office of the clerk of the Circuit Court of the county. The Court had power to confirm the award, or to direct another inquisition to be taken.

Id., p. 72, Sec. 12.

Many similar acts were passed prior to the adoption of the State Constitution of 1850. Some provided for a sheriff's jury of six, and others for a jury of twelve.

3 Territorial Laws, pp. 1028, 1125.
Territorial Laws of 1834, pp. 40, 70.
Territorial Laws of 1835, Special Session, pp. 5, 32, 83, 101.
State Laws of 1836, pp. 267-358.
State Laws of 1837, pp. 217, 227, 269.
State Laws of 1837, Adjourned Session, p. 16.
State Laws of 1838, pp. 145, 175, 196, 200, 212.
State Laws of 1844, p. 125.
State Laws of 1846, pp. 37, 45, 111, 145, 170, 179, 227; 276.
State Laws of 1847, pp. 5, 11, 106, 109.
State Laws of 1848, pp. 197, 278, 294, 351.

The system of granting special charters was abolished by the Constitution of 1850, which provides that corporations shall only be created under general laws.

Art. XV., Sec. 1.

The first general railroad law was passed in 1855. It was revised in 1871.

Mich. Laws of 1855, p. 153.
1 Mich. Laws of 1871, p. 328.

It was not until the revision of 1871 that any provision was inserted in the act for the attendance of the judge of the Court to administer oaths to witnesses and decide questions of law. In 1873 the clause was added authorizing the judge to designate a Circuit Court Commissioner to attend the jury in his place.

1 Mich. Laws of 1873, pp. 496, 515.

The State Constitution provides for the election of one or more Circuit Court Commissioners in each county "who may be vested with judicial powers not exceeding those of a judge of the Circuit Court at chambers."

Art. VI., Sec. 16.

In Massachusetts each county has three county commissioners who are authorized to lay out highways, and to determine in the first instance the damages private property owners may sustain.

Mass. Rev. Stat., 1836, p. 231, Sec. 11.

Any party dissatisfied with the award of the commissioners may have a jury to redetermine the damages.

Id., p. 231, Sec. 13.

The county commissioners issue a warrant to the sheriff, or his disinterested deputy, or to a coroner, to summon a jury of twelve men, and the commissioners may, at the request of either party, "appoint some suitable person to preside at the trial by the jury, in which case the jury may be attended by any deputy sheriff; but if there be no such person appointed, the sheriff of the county shall preside at such trial; or when the sheriff shall be interested, or unable from sickness or other cause to attend, a coroner of the county shall preside."

The person who presides is given power to preserve order, to swear the jury and the witnesses, and to "decide all questions of law arising on the trial, which would be proper for the decision of a judge."

Id., pp. 232-233, Sec. 18, 23-25.

The sheriff in presiding over the jury acts as a judge exercising judicial powers, but in attending the jury after they have retired to deliberate on their verdict he acts as an executive officer just as his deputy might.

Read vs. Cambridge, 124 Mass., 567.

It is the duty of the officer presiding and not the jury to determine upon the admissibility of the evidence.

Merrill vs. Berkshire, 11 Pick., 269, 274.

AS FEDERAL QUESTIONS.

I.

The fact that under the Constitution and laws of Michigan the parties are permitted to act upon the first award, and to thereby pass the title and possession of the property taken but subject to such subsequent increase or reduction of the award as may be the result of an appeal and a new trial, does not make the proceedings obnoxious to the provision of the Fourteenth Amendment that no State shall deprive any person of his property without due process of law.

The Supreme Court of Michigan sustained the constitutional validity of the statute in question in this case by affirming the judgments rendered thereunder by the Circuit Court for the County of Wayne against the plaintiffs in error in this case.

Backus vs. Fort Street Union Depot Co., 103 Mich., 556.

There can be no doubt but that the question whether the statute is in conflict with the provisions of the Constitution of the State relative to the condemnation of private property to the public use is one on which the decisions of the State Supreme Court are conclusive, and are binding on the Supreme Court of the United States.

Morton vs. Shelby County, 118 U. S., 425.

In Adams Express Co. vs. Ohio, 165 U. S., 194, 219, Chief Justice Fuller, speaking for the Court, said: "The conten-

tion that the act in question is invalid because repugnant to the Constitution of the State of Ohio has been disposed of by the decision of the highest tribunal of that State sustaining its validity."

While the construction of the constitutional and statutory provisions of a State relative to the condemnation of private property to the public use is primarily within the exclusive jurisdiction of the State courts, it is nevertheless true, that such construction must always be subject to the requirement of the Fourteenth Amendment of the Constitution of the United States, that no State shall deprive any person of his property without due process of law.

The Supreme Court of the United States has an undoubted jurisdiction to interfere with, and overrule, the decisions of the Supreme Court of a State concerning the taking of private property for public purposes just so far as it may be necessary to do so, to see that the process employed is due process of law; but beyond this, the Supreme Court of the United States cannot lawfully go.

The most serious objection urged against the adoption of the Constitution of the United States was the fact that it contained no bill of rights. The ratification of the necessary number of nine States was only secured by an understanding, expressed in some of the States in the very resolutions of ratification, that amendments should be forthwith adopted curing this defect or imperfection of the original instrument.

In pursuance of this understanding the first congress at its first session proposed the first ten amendments of the constitution. The fifth of these amendments contains these words: "No person shall be" * * * "deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

At the first blush one would naturally suppose that the clause requiring the payment of a "just compensation" was added because the prior clause requiring "due process of law" was not of itself sufficient to make the payment of a just compensation the constitutional rule. But it requires very little reflection to see that the just compensation clause was added out of abundant caution and for greater certainty.

The constitution first adopted, in some of the states, contained no bill of rights. This is true of the New Hampshire constitution of 1776; the South Carolina constitution of 1776; the New Jersey constitution of 1776; the Delaware constitution of 1776; the Georgia constitution of 1777, except a provision securing the right to a trial by jury; and the New York constitution of 1777, except provisions that the right to a jury trial should remain inviolate forever, and prohibiting acts of attainder for crimes committed after the close "of the present war."

In Virginia a bill of rights was adopted in 1776 prior to the adoption in the same year of a constitution. The bill of rights provides "that all men having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected." The due process of law provision relates to personal liberty only, and reads: "That no man be deprived of his liberty except by the law of the land or the judgment of his peers." Secs. 6, 8.

The Pennsylvania constitution of 1776 contains a declaration of rights, which is very nearly identical, in these particulars, with that of Virginia just quoted. The due process of law or law of the land provision is the same. The other provision reads: "That every member of society hath a right to be protected in the enjoyment of

life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary or an equivalent thereto: But no part of a man's property can be justly taken from him or applied to public uses without his own consent or that of his legal representatives."

The Maryland constitution of 1776; the North Carolina constitution of 1776; the South Carolina constitution of 1778; and the New Hampshire constitution of 1784, each contain the "law of the land" provision in the usual form as a protection to "life, liberty or property," but the North Carolina provision omits the words "by the judgment of his peers." Neither of these constitutions contain any provision that a just compensation shall be paid for private property taken for the public use.

The first state constitution to make specific provision for compensating the owner of private property taken for public purposes is the Vermont constitution of 1777, which provides: "That private property ought to be subservient to public uses when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the pu lic, the owner ought to receive an equivalent in money." Other provisions of this Vermont constitution are a duplicate of those above quoted from the constitution of Pennsylvania. The inadequacy of these provisions as actually worded may explain why a specific provision applicable to cases where private property is taken for the public use, was thought to be advisable, if not actually necessary, and was, therefore, made a part of the Vermont constitution of 1777, and were readopted unamended in the Vermont constitution of 1786.

It was not until the adoption of the constitution of Massachusetts in 1780 that the "law of the land" or "due process of law" provision as it has come down to us

from Magna Charta, was incorporated into a state constitution without qualification, and was at the same time accompanied with a provision requiring compensation to be paid for private property taken for the public use. Part First, Art. X., XII.

Here, then, we have the forerunner of the provisions of the Fifth Amendment of the Constitution of the United States that no person shall "be deprived of life, liberty or property without due process of law; nor shall private property be taken for the public use without just compensation."

No New Hampshire constitution has ever contained a specific provision requiring compensation to be paid for private property when taken by the public, but the Supreme Court of that state had no difficulty in holding that compensation was constitutionally as necessary in that state as in any other.

Opinion of Justices, 66 N. H., 629, 633.

The grounds of the decision were that an act of the legislature of the state taking private property without compensating the owner would not be within the power conferred by the provision that "The supreme legislative power within the state shall be vested in the senate and house of representatives;" and further that it would not be "due process of law."

The first ten amendments of the constitution of the United States were adopted as limitations on the federal government only, and therefore, prior to the adoption of the Fourteenth Amendment the Supreme Court of the United States had no jurisdiction to determine whether proceedings in a state for the condemnation of private property to the public use were or were not in conflict with the limitations upon the federal government con-

tained in the Fifth Amendment. Since the adoption of the Fourteenth Amendment, however, the Supreme Court of the United States has had jurisdiction to determine whether any such state proceedings are due process of law, and as the better opinion seems to be that this question depends upon the fact whether a just compensation is required to be paid to the owner of the private property taken, the practical result is that the clause of the Fifth Amendment, that private property shall not be taken for public use without just compensation, has become, in this indirect way, a limitation on the states as well as on the general government.

If there is any distinction between the power of this court to determine whether a federal proceeding for the condemnation of private property provides for just compensation to owners, and the power of the court, to determine whether a state proceeding for the same purpose is due process of law, that distinction must be in the direction that the court has less power to review and pass upon a state statute establishing the method or course to be pursued in such cases than it has to review and pass upon the validity of an act of congress enacted for a like purpose.

From this analysis of the subject I respectfully submit that if the state statute provides for a fair trial or hearing before a competent court or tribunal, or for a succession of such trials or hearings, within a reasonable period after the property is taken, and also provides for the payment of the compensation awarded within a reasonable time after it has been finally ascertained, the Supreme Court of the United States can have nothing further to say, and cannot impose upon the states any additional requirement either of substance or detail.

The Fourteenth Amendment became operative in 1868,

but the first case in which the Supreme Court of the United States was called upon to determine the validity of a state proceeding for the condemnation of private property to the public use was decided in 1875.

Garrison vs. New York, 21 Wall., 196.

In that case it appeared that a statute of the state of New York passed in 1869 for the widening of Broadway in New York city provided for an assessment of damages before three commissioners, whose awards when confirmed by the Supreme Court were required to be paid by the city. Under this statute Daniel Garrison was awarded $40,000 and the award was confirmed by the court. A prior statute passed in 1813, and applicable to the proceedings, made the order of confirmation "final and conclusive." Nearly two months after the order of confirmation was entered, the legislature, February 27, 1871, passed an act authorizing an appeal by the city from the order of confirmation, and also authorizing the Supreme Court on an application by the city to vacate the order of confirmation, if it should appear that there had been any error, mistake or irregularity or illegal act in the proceedings at any stage, or that the assessments for the benefits or the award of damages had been unfair or unjust. The court was authorized to send the matter back to new commissioners for a new assessment.

On application by the city the Supreme Court vacated the order of confirmation and ordered another assessment before new commissioners.

Daniel Garrison then brought an action in the United States Circuit Court against the city to recover the $40,000 on the ground that he had a vested right to the award.

The Supreme Court in New York had held the subsequent statute authorizing a vacation of the order of confirmation constitutional.

Matter of Widening Broadway, 61 Barb., 483.

The New York Court of Appeals had held in an opinion by Judge Peckham that independent of the subsequent statute the Supreme Court had power to set aside the order of confirmation and to order a new assessment.

Matter of Widening Broadway, 49 N. Y., 150.

These decisions were approved and followed by the Supreme Court of the United States in an opinion by Mr. Justice Field. Among other things he said:

"The proceeding to ascertain the benefits or losses which will accrue to the owner of property when taken for public use, and thus the compensation to be made to him, is in the nature of an inquest on the part of the state, and is necessarily under her control. It is her duty to see that the estimates made are just, not merely to the individual whose property is taken, but to the public which is to pay for it. And she can to that end vacate or authorize the vacation of any inquest taken by her direction, to ascertain particular facts for her guidance, where the proceeding has been irregularly or fraudulently conducted, or in which error has intervened, and order a new inquest, provided such methods of procedure be observed as will secure a fair hearing for the parties interested in the property. Nor do we perceive how this power of the state can be affected by the fact that she makes the finding of the commissioners upon the inquest subject to the approval of one of her courts. That is but one of the modes which she may adopt to prevent error and imposition in the proceedings. There is certainly nothing in the fact that an appeal is not allowed from the action of the court in such cases, which precludes a resort to other methods for the correction of the finding where irregularity, mistake or fraud has intervened."

The opinion concluded as follows:

"There is no such vested right in a judgment, in the party in whose favor it is rendered, as to preclude its re-examination and vacation in the ordinary modes provided by law, even though an appeal from it may not be allowed; and the award of the commissioners, even when approved by the court, possesses no greater sanctity."

There can be no such vested right of property in a judgment in a condemnation suit, or in any other legal proceeding, as will prohibit the legislature or the courts of a state by authority of the legislature from granting a new trial or a rehearing, even in cases where the laws did not provide for it at the time the judgment was rendered.

Calder vs. Bull, 3 Dal., 386.
Baltimore & Susq. R. R. vs. Nesbit, 10 How., 395.

Where the laws of a state at the time a judgment in a condemnation suit, or any other judgment, is rendered expressly provide that such judgment may be reviewed on appeal, motion to vacate, or otherwise, and a new trial granted, it would be absurd to say that it had become an absolutely vested right of property.

In Sweet vs. Rechel, 159 U. S., 380, the Supreme Court of the United States, in an action to try the title to land, commenced in the Circuit Court of the United States for the District of Massachusetts, passed upon the constitutional validity of a state statute for the condemnation of private property to the public use. The city of Boston was authorized by an act passed in 1867 to take possession of certain low lands and raise the grade of the same for the purpose of promoting the public health. Title was to pass and possession could be taken whenever a description of the lands was filed by the city in the office of the register of deeds. Within one year after the lands were so taken any person interested in them could bring a

suit in equity in behalf of himself and all other persons for the recovery of compensation. The court was authorized to appoint commissioners to hear the parties, to assess the value of the lands taken, and to report to the court. Any party aggrieved by the report might except thereto and have his exceptions heard as in a suit in equity, or might apply for the framing of proper issues to be tried by a jury. The sections providing the means of enforcing payment of the compensation awarded and for costs read:

Sec. 7. "When it shall be finally determined what amount of damages any party is entitled to recover against the city of Boston, or the Boston Water Power Company, or any other defendant, a separate decree shall be entered accordingly and execution therefor shall be issued, without regard to the pendency of the claims of any other party or parties or of any other claims of such complainant."

Sec. 8. "If any party shall elect a jury he shall recover his legal costs, if the award of the commissioners shall be altered in his favor; otherwise he shall be liable for the legal costs of the other party or parties."

Those who did not present their claims within a time to be allowed by the court for that purpose were forever barred from recovering anything. A suit in equity was brought under this statute and is reported as Cobb vs. Boston, 109 Mass., 438, where the statute is quoted in full. The question before the United States Circuit Court and the Supreme Court of the United States on error, was whether the city of Boston had acquired title by virtue of the statutory proceedings. It was insisted by counsel that the statute was unconstitutional because it did not provide for the payment of the compensation before or at the time the property was taken. The Supreme Court of the United States, in an opinion by Mr. Justice Harlan, disposed of this objection as follows:

"But must compensation be actually made or tendered in advance of such taking or appropriation? Is it not sufficient, in order to meet the requirements of the constitution, if adequate provision be made for compensation?

"The constitutions of some of the states expressly require that compensation be first made to the owner before the rights of the public can attach. But neither the constitution of Massachusetts nor the constitution of the United States contains any such provision. The former only requires that the owner 'shall receive a reasonable compensation,' the latter, that private property shall not be taken for public use without just compensation. Reasonable compensation and just compensation mean the same thing."

The learned justice then referred to some Massachusetts cases and stated the conclusions to be drawn from them as follows:

"In view of these authorities, it is clear that as the constitution of Massachusetts does not require compensation to be first actually made or tendered before the rights of the public, in the property taken or applied, become complete, the requirements of that instrument are fully met where the statute makes such provision for reasonable compensation as will be adequate and certain in its results. It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner, and gives him an unqualified right to a judgment for the amount of such damages which can be enforced, that is, collected, by judicial process.

"Substantially the same principles have been announced by this court when interpreting the clause of the constitution of the United States that forbids the taking of private property for public use without just compensation."

Judge Harlan here quoted from Cherokee Nation vs. Southern Kansas Railway, 135 U. S., 641, and Kennedy vs. Indianapolis, 103 U. S., 599. Commenting upon the last named case he said:

"But that case by no means controverts the doctrine that the legislature may authorize a municipal corporation to take, for public use, at the outset, the absolute title to specific private property, if either the statute under which that is done, or a general statute, recognizes the absolute right of the owner, upon his property being taken, to just or reasonable compensation therefor, and makes provision, in the event of the disagreement of the parties, for the ascertainment, by suit, without unreasonable delay or risk to the owner, of the compensation to which under the constitution he is entitled, and to a judgment in his favor, enforceable against such corporation in some effective mode, so that the owner can certainly obtain the amount of such compensation. The Massachusetts statute of 1867, unlike the Indiana statute, expressly declares that from the moment the property was taken in accordance with its provisions, the title should be vested in the city of Boston; that the city should thereupon proceed forthwith with the work of raising the grade; and that the owner should have the right, for the prompt enforcement of which adequate provision was made, to obtain reasonable compensation for his property."

After referring to some of the cases relied upon by counsel, Judge Harlan stated the final conclusion of the court, on the question under consideration:

"The case now before us differs from all, or nearly all, of those cited by the plaintiffs in this, that in the latter the statute, under which the property was taken, either expressly, or by necessary implication, made the payment or tender of the compensation awarded to the owner of the property appropriated to public use, a condition precedent to the acquisition of title by the party at whose instance the property was taken; whereas, in the present case the statute vests the title in the city of Boston from, at least, the time it filed in the office of the registry

of deeds a description of the lands taken by it describing them with as much certainty as is required in a common conveyance of lands, and stating that the same were taken pursuant to the provisions of the statute. As soon as they were so taken the city—invested from that time with the title—had the right forthwith to raise the grade, and could not throw the property back upon the former owner, or compel him to pay the cost of raising the grade; and the owner became from the moment the property was taken absolutely entitled to reasonable compensation, the amount to be ascertained without undue delay, in the mode prescribed, and its payment to be assured, if necessary, by decree against the city, which could be effectively enforced.

"We are of opinion that, upon both principle and authority, it was competent for the legislature, in the exercise of the police powers of the commonwealth, and of its power to appropriate private property for public uses, to authorize the city to take the fee in the lands described in the statute, prior to making compensation, and that the provision made for compensating the owner was certain and adequate."

In the recent case of Chicago, Burlington & Quincy Railroad Co. vs. Chicago, 166 U. S., 226, the court, in an opinion by Mr. Justice Harlan, made an exhaustive examination of the question whether a state proceeding taking property for the public use could be considered due process of law if it did not provide for compensating the owner, and reached the very satisfactory conclusion that compensation to owners was necessary to the validity of any such proceeding. (Pp. 235-241.)

In the case before the court, however, it appeared that the constitution and laws of the state of Illinois plainly provided for compensation, the only question in controversy being whether in the particular case under consideration, the constitution and laws of the state, in respect to compensation, had been observed.

The city of Chicago opened a highway across the tracks and right of way of the Chicago, Burlington & Quincy

Railroad, and a jury fixed the compensation of the company at one dollar. Judgment was entered on this award, and the same was affirmed by the Supreme Court of the state. 149 Ill., 457.

The jury making the award had all the elements and qualifications of a common law jury, and for that reason the Supreme Court of the United States, in reviewing the decision of the State Supreme Court, was subject to the provision of the Seventh Amendment of the constitution of the United States that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

In view of this limitation on the power of the court to review the facts Judge Harlan said:

"Even if we were of opinion, in view of the evidence, that the jury erred in finding that no property right, of substantial value in money, had been taken from the railroad company, by reason of the opening of a street across its right of way, we cannot, on that ground, re-examine the final judgment of the state court. We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation.

"We say, 'in absolute disregard of the company's right to just compensation,' because we do not wish to be understood as holding that every order or ruling of the state court in a case like this may be reviewed here, notwithstanding our jurisdiction, for some purposes is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the federal right alleged to have been denied; and in respect to such matters, that which is done or omitted to be done by the state court, may constitute only error in the administration of the law under which the proceedings were instituted.

"In Lent vs. Tillson, 140 U. S., 316, 331, which was a case of the widening of a public street, for the cost of which bonds were issued, to be paid by taxation on the

lands benefited, in proportion to the benefits, and in which it was alleged by a property-owner that the local statute had been so administered as to deprive him of his property without due process of law, this court said: 'Errors in the mere administration of the statute, not involving jurisdiction of the subject matter and of the parties, could not justify this court, in its re-examination of the judgment of the state court, upon writ of error, to hold that the state had deprived, or was about to deprive, the plaintiffs of their property without due process of law. Whether it was expedient to widen Dupont street, or whether the board of supervisors should have so declared, or whether the board of commissioners properly apportioned the cost of the work, or correctly estimated the benefits accruing to the different owners of property affected by the widening of the street, or whether the board's incidental expenses in executing the statute were too great, or whether a larger amount of bonds were issued than should have been, the excess, if any, not being so great as to indicate upon the face of the transaction a palpable and gross departure from the requirements of the statute, or whether upon the facts disclosed the report of the commissioners should have been confirmed, are none of them issues presenting federal questions, and the judgment of the state court upon them cannot be reviewed here.'

"In harmony with these views, we may say in the present case that the state court having jurisdiction of the subject matter and of the parties, and being under a duty to guard and protect the constitutional right here asserted, the final judgment ought not to be held to be in violation of the due process of law enjoined by the Fourteenth Amendment, unless by its rulings upon questions of law the company was prevented from obtaining substantially any compensation. See also Marchant vs. Pennsylvania Railroad, 153 U. S., 380."

II.

The just compensation the plaintiffs in error were entitled to receive for the property taken was fairly and impartially determined in the courts of the state after notice and a full hearing, and the rendition of a regular, valid and final verdict by a common law jury. The judgments rendered upon the verdict were duly affirmed by the Supreme Court of the state, and there is no foundation for the contention of the plaintiffs in error that they were deprived of their property without due process of law; nor is there the slightest reason to believe the compensation finally awarded was inadequate or unjust.

1. Each of the juries empanelled in this case, under the constitution and laws of Michigan, was a jury within the meaning of the seventh amendment of the constitution of the United States, providing that "in suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law."

This is settled by a very recent decision of this court in a case in which the opinion of the court was delivered by Mr. Justice Harlan.

> Chicago, Burlington & Quincy R. R. vs. Chicago, 166 U. S., 226, 242-46.

After referring to the constitution and laws of Illinois providing for a jury in condemnation cases the opinion states the conclusions of the court on the question as follows:

"The persons empanelled in this case to ascertain the just compensation due to the railroad company constituted a jury as ordained by the constitution of Illinois in cases of the condemnation of private property for public use, and, being a jury within the meaning of the Seventh Amendment of the constitution of the United States. the facts tried by it cannot be retired 'in any court of the United States otherwise than according to the rules of the common law.' The only modes known to the common law 'to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a venire facias de novo by an appellate court, for some error of law which intervened in the proceedings.' Parsons vs. Bedford, 3 Pet., 433, 447, 448; Railroad Company vs. Fraloff, 100 U. S., 24, 31.

"To this may be added that congress has provided that the final judgment of the highest court of a state in cases of which this court may take cognizance shall be re-examined upon writ of error, a process of common law origin, which removes nothing for re-examination but questions of law arising upon the record. Egan vs. Hart, 165 U. S., 188."

2. The damages awarded in this case were entirely just to the property-owners. The plaintiffs in error have no possible ground of complaint on that score.

The second jury made an aggregate award of $96,143.

The Circuit Court for the County of Wayne had occasion to consider this award on a motion for a new trial, in which the company alleged that the damages awarded were "grossly extravagant, exorbitant and excessive;" that they were "so excessive, unwarranted and unjust as to show that the jury were actuated by passion or prejudice;" and that they were "unwarranted by and against the weight of evidence."

Record, pp. 849, 862, folio 1486.

These grounds were sustained by the court in an able and well-considered opinion by Circuit Judge Gartner.

Record, pp. 878, 928, folio 1601.

The Supreme Court of the state on a subsequent examination of the same record on appeal, reached the same conclusion and approved of the opinion expressed by the Circuit Judge.

Record, pp. 948, 961, folio 1658.
Fort Street Union Depot Co. vs. Backus, 92 Mich., 33, 55.

I would be very glad to discuss the correctness of these rulings on the facts disclosed by this record, if the question was open to consideration in this tribunal; but until otherwise instructed by the court I shall assume that the courts of a state in setting aside a verdict as against the weight of evidence do not violate the constitution of the United States.

The third jury awarded the plaintiffs in error $63,000, or $33,143 less than the prior verdict. Upon this record and the facts of the case as disclosed by it, there is no reason to believe that the last award is not the more just and reasonable one.

III.

There was no such interference with the functions or province of the juries empanelled in this case, or with the due and regular course of the proceedings, or denial of the right to be fully heard or disregard of the facts of the case, or abuse of the judicial power of the state, as to furnish any ground whatever for the conclusion that the plaintiffs in error were deprived of their property without due process of law, or that they were denied the equal protection of the laws.

The distinguished counsel for the plaintiffs in error makes the general charge that the State Supreme Court did not apply to this case the settled law of the state as applied and enforced in other like cases, and that his clients were discriminated against in violation of the Fourteenth Amendment.

To sustain this charge he relies upon the following particulars or specifications:

(1) He alleges that the settled law of the state is that the verdict of the jury in a condemnation suit upon the questions of public necessity and just compensation must be a unit, and that the State Supreme Court violated this law when it affirmed the verdict of the second jury on the question of necessity, and ordered a new trial on the question of compensation only.

Brief for Plaintiffs in error, p. 45.

(2) He alleges that the settled law of the state is that the Circuit Judge, or other judicial officer has no right to attend the jury and preside over them during the inquest or trial, and no right to rule on questions of evi-

dence or to advise or instruct the jury on the law of the case, and that the State Supreme Court violated this law in affirming the action of Circuit Judge Gartner, in presiding over the third jury, and conducting the inquest as a common law trial.

The learned counsel presented no assignment of error to the State Supreme Court, nor does he make any assignment of error or argument in this court, to the effect that Judge Gartner erred in any ruling on evidence, or in any instructions or want of instructions to the jury. His whole objection is based on the presence of Judge Gartner at the inquest.

Brief for Plaintiffs in error, p. 49.

(3) He alleges that it is the settled law of the state that the plaintiffs in error were entitled to compensation for injury to their business, including damages to the other parts of their plant, (parcels of real estate and buildings, situated long distances from the property taken, that is, from the property in front of which the elevated railroad or viaduct was built), and that the Circuit Court on the motion to set aside the verdict of the second jury, and the Supreme Court in considering the same verdict on appeal, failed to apply this measure of compensation.

He makes no assignment of error or argument to show that the Circuit Judge on the third trial refused or neglected to properly instruct the jury on the measure of damages, or that the jury in the award made were not governed by a just measure of compensation.

Brief for Plaintiffs in error, p. 58.

(4) He further contends that the Supreme Court of the state denied to the plaintiffs in error, as appellees in that court, on the appeal of the Depot Company from

the verdict of the second jury, a hearing on two important and vital questions of law.

Brief for Plaintiffs in error, p. 67.

(5) He further and finally contends that the plaintiffs in error were deprived of the property levied upon under the judgment rendered and the executions issued against them in this case, because such judgments and executions were, as he alleges, without statutory authority and "unknown to jurisprudence."

Brief for Plaintiffs in error, p. 87.

I will consider the questions raised by counsel in the order in which I have summarized them.

(1) Must the verdict of the jury on the two issues, of public necessity and just compensation, be inseparable?

The only ground for any such contention is that furnished by the case of Paul vs. Detroit, 32 Mich., 108, 118, where the Supreme Court of the state passed on the validity of the provisions of a city charter for the opening of streets and alleys, which required the jury to determine the question of necessity on a view of the premises before hearing any evidence, and also required them to assess the damages awarded, on the property benefited by the improvement. The court held (1) that the parties should be heard by evidence and otherwise, before the jury determined the necessity; and (2) that inasmuch as the damages awarded could not exceed the benefits to be assessed, the questions of necessity and compensation were dependent upon each other and could not be disposed of separately. After laying down the first of the foregoing propositions the court said:

"But this is not all. A jury can render only one verdict, and that can only be given when the whole inquiry before them is ended. In cases like this they cannot determine the necessity by itself. It depends on the other facts, as well as on the question of convenience.

"The owner of the property taken is entitled to receive full compensation for any damages done him. The jury have no right, without foreswearing themselves, to give him any less than just compensation. If the damages are to be charged on property according to its benefits, that property cannot be charged with more than its benefits, and if the benefit does not equal the cost, that ends the inquiry. It can never be legally necessary to take property unless the result of the taking is a benefit equal to the cost, and it can never be legal to compel an owner to receive less than just compensation. Until the jury determine, not only that the improvement is desirable, but that it is worth to the public or to the parties chargeable all they must severally pay to fully remunerate the owner, the necessity cannot be established, and the property cannot be lawfully taken."

It is hardly necessary to say that such a case is entirely different from a condemnation by a private corporation. Such a corporation must pay a just compensation for the property taken, whether it receives a corresponding benefit or not, and where there is no statute limiting the compensation to, or making it dependent upon, the benefits, there is no reason why a verdict in favor of the public necessity may not be affirmed, and a new trial ordered on the question of compensation only.

(2) Is it competent for a state to provide that a condemnation jury may be permitted to hold an inquest without the attendance of a judge or other judicial officer, or that a judge, (or an officer to be designated by him), may attend the jury and preside at the inquest, with power to decide questions of law?

With those who are reasonably familiar with the sheriff's jury of English law, and the sheriff's jury of most of the states, or with the sheriff's jury of Michigan law,

before the adoption of the constitution of 1850, to propound the foregoing question is to answer it. I here recall attention to the third general subdivision of this brief.

The question whether the State Supreme Court refused in this case to follow its own decisions, on the part a judge can take in a condemnation suit, is fully examined by me in the brief herewith submitted in support of the motion to dismiss, pp. 18-21, and it therefore need not be again examined here. It is plain there is nothing in the point either as a state or federal question.

(3) Is it true that the State Supreme Court refused to apply to the property of the plaintiffs in error the same measure of damages or compensation that it has applied in other like cases?

The only thing referred to by the learned counsel as indicating any such thing is that part of the opinion of the Supreme Court approving the opinion of Circuit Judge Gartner, that the $96,143 verdict was excessive. There is not a word in the record indicating that either the Circuit Judge, the Supreme Court or the third jury, refused to give the plaintiffs in error damages for injury to their business, or for injury to their general manufacturing plant.

After stating to the jury that they were to determine the amount to be awarded to Absalom Backus, Jr., as the owner of the fee of the land described, and to A. Backus, Jr., & Sons, as tenants in possession of such lands, the Circuit Judge advised the jury upon the subject of damages as follows:

"Upon this question, viz.: compensation or damages, what I have to say must necessarily be in a broad and most general way. This is a question for you, and from the very nature of a proceeding of this character you are vested with large powers and great discretion. These

powers and this discretion should not be exercised arbitrarily, nor without proper regard for substantial justice. You should bear in mind that the greater the power, the more jealous is the law of its careful exercise, and the greater is the responsibility of the persons vested therewith. You should exercise a cool, careful, intelligent and unbiased judgment. The compensation or damages must be neither inadequate or excessive, and your award must not furnish a just inference of the existence of undue influence, partiality, bias and prejudice, or unfaithfulness in the discharge of the duties imposed upon you. You must, however, remember that the respondents' property is taken, or its enjoyment interfered with under the so-called power of eminent domain, a power somewhat, and necessarily, arbitrary in its character, and that where this is done the party whose property is taken, or whose enjoyment or use of the property is interfered with, is entitled to full compensation for the injury inflicted. While the allowance to be made should be liberal, still it must not be unreasonably exorbitant or grossly excessive. It should be a fair and liberal allowance and full and adequate compensation for the damages inflicted. You should not allow too little nor should you allow too much. Your award should be based upon that which is real and what is substantial, and not upon what is either fictitious or speculative. You should look at the conditions of things as they exist. Under the constitution and laws the right to take another's property for public uses, the power to exercise the right of eminent domain, is a part of the law of the land, but when this power is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation."

There is absolutely nothing in this language excluding any element of damages from the consideration of the jury. The court allowed the jury to exercise their own judgment, and if the counsel for the plaintiffs in error had desired any particular directions to the jury, he should have submitted requests to charge. There was nothing objectionable in the instructions, and there is

no sort of foundation for the claim that the just measure of compensation enforced in other like cases, was not observed in this case.

(4) Is it true that the Supreme Court of Michigan denied to the plaintiffs in error a hearing upon any question of law involved in their case?

a denial on two different questions of law: (1) on the

Their counsel insists that the court was guilty of such question whether the adjoining railroad property of the Michigan Central Railroad Company was not subject to condemnation by the Fort Street Union Depot Company; (2) on the question whether the circuit courts in Michigan have power to set aside the verdicts of condemnation juries and to grant new trials.

On the first and second trials the counsel for the respondents, the plaintiffs in error here, contested the public necessity of occupying River street with the elevated railroad or viaduct of the Depot Company, on the ground that the more proper and better place to construct the same was over and along the railroad property of the Michigan Central Railroad Company adjoining River street opposite the property of the respondents. The learned counsel, in his zeal to serve his clients, made this claim in the face of a statute of the state expressly prohibiting the condemnation by one railroad or depot company of the rights of way or depot grounds of another company, except for the purpose of making crossings.

1 How. Stat., Secs. 3463, 3331.
Union Depot Co. vs. Backus, 92 Mich., 49-51.

There being no judge present to rule on the question, the counsel was under no restraint, and he went so far as to prove by the witness J. B. Mulliken, the superintendent of a railroad, that Geo. V. N. Lothrop, for many

years the recognized leader of the Michigan bar, had once advised him that a railroad company wanting terminal facilities could condemn the grounds of the Michigan Central.

Record, p. 259, folio 445.

Notwithstanding the statements and arguments of the learned counsel, and the testimony so introduced, the second jury found in favor of the public necessity of building the viaduct in River street, and assessed the damages of the respondents as stated.

Record, p. 847, folio 1459.

The Fort Street Union Depot Company appealed from this award and from the confirmation thereof. The second to the tenth grounds of the appeal were to the effect that the erroneous and misleading contentions of the counsel for the respondents in regard to the power to condemn a right of way along the property of the Michigan Central had prejudiced the jury against the Fort Street Union Depot Company on the question of damages.

Record, p. 947; pp. 849-861.

When the appeal was submitted to the State Supreme Court these grounds were fully discussed in the briefs of counsel, and also in their oral arguments as far as they saw fit to do so. The court carefully examined the subject in the opinion delivered, and sustained the position of counsel for the appellant.

Union Depot Co. vs. Backus, 92 Mich., pp. 33, 49-55.

The court affirmed the award on the question of necessity but ordered a new trial of the question of damages.

The new trial of the latter question resulted in the reduction of the damages as stated.

Record, p. 980.

Judgments were entered in favor of the company for the reductions so made.

Record, p. 1791.

The respondents sued out a writ of certiorari to review these judgments.

Record, p. 1802.

Their thirty-third assignment of error was in part that on the former hearing in the Supreme Court, on the appeal of the company, "the Chief Justice of the court, when counsel for respondents were about to argue the question as to whether the property of the Michigan Central Railroad could be taken, and as to whether it was error below for counsel for respondents to argue that the said Michigan Central Railroad Company's property could be taken, stopped that part of the argument of said counsel for the respondents, and stated that this court did not desire to hear argument on that question, because the verdict of the jury had been unfavorable to the respondents on the question of necessity; but nevertheless this court did, without having offered to hear counsel for petitioners, decide the same adversely to the respondents."

Record, p. 1815.

Although there is nothing in the record anywhere on which to base any such assignment of error, counsel has renewed it in this court.

Record, p. 1828.

The facts are that when counsel undertook to discuss the power to condemn the Michigan Central property, he

did so as an attack on the verdict of the jury on the question of necessity the same as if he had appealed therefrom.

But as he had not appealed, the Chief Justice called his attention to the fact that the verdict of the jury had disposed of the question of necessity, unfavorably to the Michigan Central route. Counsel had not reached the question whether his contentions before the jury in regard to the Michigan Central Railroad property had not prejudiced the jury on the question of damages, and as he closed his argument without further reference to the subject, the court had a right to suppose that he submitted that part of the case upon his printed brief, which covered the question fully.

If the Supreme Court of a state should deny a party a hearing on a question of fact or of law under such circumstances as to deprive him of his life, liberty or property without an opportunity to be heard, it would be incumbent upon the aggrieved person to take direct means of reviewing the action of the court, and it would be necessary for the Supreme Court of the United States to obtain some sort of return from the State Supreme Court, or by other evidence to ascertain just what did occur and just what the facts were, upon which it was called upon to exercise the jurisdiction vested in it by the constitution. It would hardly do to act upon what appears to be an unsupported and unwarranted assignment of error.

The other contention of the learned counsel under this head is equally without merit.

The Circuit Court for the County of Wayne on a motion regularly made set aside the verdict of the second jury in this case, and granted a new trial.

Record, p. 930.

On an application for a mandamus the State Supreme Court held that the Circuit Court had no power to grant a new trial in a railroad condemnation suit.

Backus vs. Gartner, 89 Mich., 209.

A copy of the order granting the mandamus having been filed in the Wayne Circuit, that court, in obedience thereto, entered an order confirming the verdict of the jury.

Record, pp. 930, 945.

The Fort Street Union Depot Company then took an appeal under the statute to the State Supreme Court, and among other grounds of appeal, insisted that the order of confirmation was entered under a writ of mandamus improvidently issued by the Supreme Court.

Record, p. 931.

On the hearing of the appeal in the Supreme Court the question of the powers of the Circuit Court in condemnation cases was carefully examined and discussed by counsel on both sides. Carefully prepared and elaborate briefs were also presented. It is creditable to the Supreme Court of Michigan that being convinced the previous ruling was erroneous, it promptly overruled it.

Fort Street Union Depot Co. vs. Backus, 92 Mich., 33.

But the writ of mandamus had already done its work, and the new trial ordered by the Wayne Circuit never took place.

The Supreme Court referred to this feature of the case as follows:

"The court below acting in the present case upon the motion before it undoubtedly had the power to pass upon

the question presented to it by the affidavits, and to vacate and set aside the award of the jury. No substantial injustice has been done, however, by the mandate of this court compelling the court below to confirm the findings and award of the jury, for the reason that under the statute, this court, under its appellate power, may consider all the questions there involved and determine the rights of the parties thereunder."

In the exercise of its appellate power the Supreme Court examined the case and set aside the verdict of the jury awarding compensation, and granted a new trial on that question.

The most remarkable feature of the case is that the learned counsel for the plaintiffs in error should contend that a ruling of the State Supreme Court, which had no operation whatever in their case, deprived them of their property without due process of law, and this in face of the fact that they were given as full and complete a hearing on the question as it is possible to give a litigant.

(5) Is it true that the judgments and executions against the plaintiffs in error are without statutory authority and unknown to jurisprudence?

The opinion of the State Supreme Court disposes of these questions as follows:

"The amount of the first award was paid to the respondents pending the appeal to this court. Upon the second trial the award was diminished, and judgment entered for the petitioner for the difference between the two awards. The statute provides for the payment of this sum by the respondents to the petitioner. We think judgment for this amount was properly entered. As already stated, this proceeding is in the Circuit Court, and the statute clearly contemplates the entry of judgment and the issue of execution to enforce the finding of the jury. The statute expressly provides for the entry of judgment. How. Stat., § 3468. A general statute also

provides for issuing execution upon any judgment rendered in any court of record. How. Stat., § 7664."

Backus vs. Fort Street Union Depot Co., 103 Mich., 556, 563.

There can be no doubt but the construction so given the statutes is correct.

At all events it is a matter on which the decision of the State Supreme Court is conclusive.

The hearing of this case has been delayed because of the engagements of the distinguished counsel for the plaintiffs in error as senior counsel for the United States before the Behring Sea Commission, and for that reason I request an early decision.

I respectfully submit that the writ of error should be dismissed, or the judgments below should be affirmed.

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Attorney for the Fort Street Union Depot Company.